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THE  
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT  
OF ONTARIO (THE COURT OF APPEAL FOR  
ONTARIO AND THE HIGH COURT OF  
JUSTICE FOR ONTARIO).

L-2569

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CITED [1949] O.R.

REPORTED UNDER THE AUTHORITY OF THE  
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JUDGES  
OF  
THE SUPREME COURT OF ONTARIO  
DURING THE PERIOD OF THESE REPORTS.

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The Honourable ROBERT SPELMAN ROBERTSON (appointed 20th December 1938).

*Chief Justice of the High Court.*

The Honourable JAMES CHALMERS McRUER (appointed a Justice of Appeal 14th October 1944; appointed Chief Justice of the High Court 28th December 1945).

*Puisne Judges.*

The Honourable JOHN BELL AYLESWORTH (appointed a Justice of Appeal 30th October 1946).

The Honourable FRED HOLMES BARLOW (appointed a Judge of the High Court 15th December 1942).

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The Honourable EDGAR RUDOLPH EUGENE CHEVRIER (appointed a Judge of the High Court 23rd September 1936).

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# REPORTS OF CASES

DETERMINED IN THE

## SUPREME COURT OF ONTARIO

1949

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[COURT OF APPEAL.]

Re Eacrett.

*Charities—Charitable Bequests—Validity—Certainty—Discretion Given to Trustee.*

A gift of the residue of an estate to the executor "to hold in trust and to use for such charitable purposes or for civic betterment or for the relief of poverty as he shall in his sole discretion deem advisable" is void for uncertainty. The phrase "for civic betterment" is not necessarily charitable, and the gift consequently gives a discretion to the executor to use the moneys either for charitable purposes or for indefinite and uncertain non-charitable purposes.

The classification of charities made by Lord Macnaghten in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, must now be read as explained and qualified in *Williams' Trustees v. Inland Revenue Commissioners*, [1947] A.C. 447, which is authority for the following propositions: (1) a trust is not charitable unless it falls within the spirit and intendment of the statute 43 Eliz., c. 4; (2) not every object of public general utility is necessarily charitable.

AN APPEAL by the next-of-kin of Richard James Eacrett, deceased, from a judgment of Smily J., given in Weekly Court at London, on a motion by the executor for the construction of the will.

8th November 1948. The appeal was heard by FISHER, HOPE and HOGG JJ.A.

*J. A. E. Braden, K.C.*, for the next-of-kin, appellants: There was, and is, no "Exeter District Hospital Committee" in existence. It is true that there is a hospital committee of the Exeter Lions Club, but if the testator had had that committee in mind he would have mentioned it in the will. The gift thus fails for want of a recipient.

The residuary clause does not constitute a valid charitable bequest, as found by the judge of first instance. Three separate purposes are mentioned, separated by the word "or", which dis-



tinguishes them. The executor has been given the widest possible discretion and might, in full accordance with the terms of the will, dispose of the entire residue for non-charitable purposes: *Re Hawkins* (1929), 36 O.W.N. 347. [HOPE J.A. referred to *Re Coats' Trusts*; *Coats v. Gilmour et al.*, [1947] 2 All E.R. 422.] The clause is too wide and vague. It is true that the executor might give the money to charitable purposes, but the bequest must be one which the Court could execute—it must be clearly enough expressed to enable the Court, if necessary, to administer the trust. The object selected by the executor under this clause might be benevolent and philanthropic, but still not charitable in the legal sense.

*E. D. Bell, K.C.*, for the executor, respondent: The law in Ontario is not necessarily the same as that of England. The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147, defines charities for this Province, and all the purposes specified in the residuary clause fall within s. 2 of that Act. In England the statute 43 Eliz., c. 4, was amended by The Mortmain and Charitable Uses Act, 1888, c. 42. [HOPE J.A.: It has recently been authoritatively stated in England, in *Williams' Trustees v. Inland Revenue Commissioners*, [1947] A.C. 447, [1947] 1 All E.R. 513, that not every object of public utility is necessarily charitable.] Under our Act such a purpose would be deemed charitable: *Attorney-General v. National Provincial and Union Bank of England et al.*, [1924] A.C. 262; *Re Knowles*, [1938] O.R. 369 at 375-6, [1938] 3 D.L.R. 178. This Court should follow the law as laid down in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, rather than that in the *Union Bank* and *Williams' Trustees* cases. [HOGG J.A.: We are bound to follow the decisions of the House of Lords in matters of English law, under *Robins v. National Trust Company, Limited, et al.*, [1927] A.C. 515, [1927] 2 D.L.R. 97, [1927] 1 W.W.R. 692.] We have our own statute, which has changed the English law. The term "civic betterment" should be interpreted as meaning something beneficial to the community, and hence comes within our statute.

*W. G. Cochrane*, for the Exeter Lions Club, respondent: I am not concerned with the residuary clause. Whatever may be said of it, the gift for the benefit of the hospital should be upheld. There was a committee in existence, answering to the description of the testator. If the proviso is void for uncertainty, then effect

should be given to the original bequest, without the proviso: *Faversham Corporation v. Ryder* (1854), 23 L.J. Ch. 905.

G. F. Adams, for the Public Trustee, respondent: I can find no case where the words "civic betterment" have been construed, but they should be construed as meaning purposes beneficial to the community, and the gift thus constitutes a valid charitable bequest.

J. A. E. Braden, K.C., in reply: The word "civic" was used in *In re The Friends' Free School; Clibborn v. O'Brien*, [1909] 2 Ch. 675 at 679. The phrase "civic betterment" may indicate something beneficial, but that is not enough; the gift must be charitable within the established definition. I refer to *Cameron v. The Church of Christ, Scientist, et al.*, (1918), 57 S.C.R. 298, 43 D.L.R. 668 at 676. *Re Knowles, supra*, is distinguishable, in that the object there was definite. I refer also to Theobald on Wills, 10th ed. 1947, pp. 269, 277.

*Cur. adv. vult.*

29th November 1948. FISHER J.A. agrees with HOPE J.A.

HOPE J.A.:—This is an appeal by the next-of-kin of the deceased testator from a judgment of Mr. Justice Smily pronounced at the hearing of a motion made by the executor of the estate of the deceased in Weekly Court at London on Saturday the 26th June 1948 for the construction of the will of the said deceased. No record of the learned judge's reasons was available to this Court.

The will of the deceased, dated the 7th October 1947 and modified by a codicil thereto dated the 18th November 1947, gave all his real and personal estate to his executor upon trusts set out in the said will. The first trust was to pay numerous legacies ranging from \$100 to \$1,000 to named beneficiaries, totalling approximately \$4,000. The estate aggregated approximately \$14,000. After directing payment of the aforesaid legacies, the will provided as follows:

"(1) To pay to The Exeter District Hospital Committee the sum of One Thousand Dollars. In the payment of this bequest I direct that it shall be in the discretion of my executor as to whom this sum should properly be paid for the purpose of erecting a hospital in or near the Village of Exeter, and in the event that no Association or Committee has been set up for the purpose



of building the said hospital within two years of my death then I direct that the said gift shall lapse.

"I also provide that if in the opinion of my executor hereinafter named the attempt to construct the said hospital is abortive or unlikely to succeed for many years my said executor may in his discretion use the said monies in the same way as is provided in respect of the residue of my estate.

"ALL the Rest, Residue and Remainder of my estate I direct my executor to hold in trust and to use for such charitable purposes or for civic betterment or for the relief of poverty as he shall in his sole discretion deem advisable provided, however, that the said monies shall not be expended outside the Province of Ontario. I further direct that my executor may postpone the payment of the said sum or part thereof in his uncontrolled discretion for a period up to ten years from the date of my death if in his discretion he feels that the exigencies of the situation are such as to require that the monies should not be expended at a greater rate."

The next-of-kin of the deceased are his daughter, in whose home the deceased resided until his removal to hospital, and a granddaughter who is the daughter of a son who predeceased the deceased. The two questions propounded to the Court on the motion were as follows:

"1. Is the disposition in Clause 1(one) of the said Will a valid gift to the Exeter District Hospital Committee or for the erection of a hospital in or near the Village of Exeter, or is it rendered void by conferring upon the Executor named the power to designate in the alternative, other or unascertained beneficiaries. ....?"

"2. Is the disposition in the residuary clause of the said Will a valid charitable gift or trust, or is it void for uncertainty . . . ?"

I am of the opinion that the learned trial judge was correct with respect to the legacy directed to be paid to the hospital. A hospital committee, answering very closely to the description of that named by the testator and for the purpose mentioned by him, was in existence prior to the drawing of the will, although it may well be that such fact was unknown to the testator. Subject to the discretion of the executor as expressed in the will, namely, that within two years no committee or organization which is likely to succeed for many years in achieving the purpose intend-

ed by the testator, then the legacy would fall into the residue. Otherwise, however, I am of the opinion that the legacy is valid.

In *Theobald on Wills*, 10th ed., 1947, at p. 281, the learned author states: "A gift to such charitable institutions and schemes already constituted or which may hereafter be constituted as the trustees of the will may select is a good charitable gift."

With respect to the residue of the estate, however, I am of the opinion that the learned trial judge's decision must be reversed and that it must be declared that this provision of the will is invalid and void by reason of uncertainty.

It was argued by counsel that from a reading of the will it was evident that there was a broad, overriding, charitable intent as to the residue and that charitable gifts do not fail for uncertainty.

In *Hunter et al. v. The Attorney-General and Hood*, [1899] A.C. 309 at 315, the Earl of Halsbury L.C. stated: ". . . it would be a strange canon of construction for a will to say that wherever you can discover what a testator's desires and wishes were, although you cannot find express words in the will which give the authority sought for, nevertheless you can supply words and declare trusts which are not to be found in the will itself—that, to put it plainly, the testator's intention is to be judged by the general desire that he has expressed to have his money devoted to such a purpose. To create a trust by such a process of argumentation as that appears to my mind to be not interpreting the will, but making a will for the testator."

It was argued in support of the judgment that the provision of the will as to the residue of the estate fell within the definition contained in s. 2 of The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147, in that the four categories enumerated in the said section are ones which shall be deemed to be charitable uses. The word "deemed" has no technical or peculiar signification when used in legislation, but like other words, must be interpreted with reference to the whole Act of which it forms a part: see *Hickey v. Stalker*, 53 O.L.R. 414, [1924] 1 D.L.R. 440. Moreover, the foregoing section of The Mortmain and Charitable Uses Act is only a definition within the meaning of that Act and not otherwise. The four categories enumerated in the foregoing s. 2 are those which were mentioned by Lord Macnaghten in *The Commissioners for Special Purposes of the Income Tax v. Pemsell*,

[1891] A.C. 531. That case has had recent attention in *Williams' Trustees v. Inland Revenue Commissioners*, [1947] A.C. 447, [1947] 1 All E.R. 513. In the latter case, in the House of Lords, Lord Simonds, in a judgment approved by the other members of the House, exhaustively reviewed the earlier cases on this matter and established two propositions: firstly, that a trust is not charitable unless it is within the spirit and intendment of the preamble of the statute 43 Eliz., c. 4, and, secondly, that the classification of charity in its legal sense into four principal divisions in the *Pemsel* case must be read subject to the qualification that every object of public general utility is not necessarily charitable. The following extracts from the judgment of Lord Simonds, at p. 455, may well be noted:

“ . . . there are two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers, unless it is within the spirit and intendment of the preamble to the statute of Elizabeth . . . The second is that the classification of charity in its legal sense into four principal divisions by Lord Macnaghten in *Income Tax Commissioners v. Pemsel* must always be read subject to the qualification appearing in the judgment of Lindley L.J. in *In re Macduff*, [1896] 2 Ch. 451, 466: ‘Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must necessarily be a charity. Some may be, and some may not be.’ This observation has been expanded by Lord Cave L.C. in this House in these words: ‘Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust. See *Attorney-General v. National Provincial & Union Bank of England*, [1924] A.C. 262, 265.’ But it is just because the purpose of the trust deed in this case is said to be beneficial to the community or a section of the



community and for no other reason that its charitable character is asserted. It is not alleged that the trust is (a) for the benefit of the community and (b) beneficial in a way which the law regards as charitable. Therefore, as it seems to me, in its mere statement the claim is imperfect and must fail."

In the *Williams' Trustees* case Lord Normand, in agreeing with the reasons of Lord Simonds, stated: "Discordant decisions have resulted from the occasional failure to keep in mind the two propositions which my Lord has now re-asserted and from the tacit assumption that all trusts beneficial to the public at large or to some section of it are entitled by a benevolent construction to the special privileges of charitable trusts."

In Theobald, *op. cit.*, at pp. 282-3, the learned author states: "Where a discretion is left to trustees, which would empower them to apply the whole of the gift either to charitable or other indefinite purposes, the whole gift is void, as it does not appear that the chief object was charity; and, on the other hand, the other object is void for uncertainty."

In *In re Clarke; Bracey v. Royal National Lifeboat Association*, [1923] 2 Ch. 407, it was held where there was a trust to divide the residue between such indefinite charitable and non-charitable objects as the executors should think fit, in such shares as the executors should determine, the gift and the executors' power of distribution were void. Again at p. 277 the learned author of Theobald, *op. cit.*, states: "Gifts for public purposes generally are void for uncertainty."

Counsel for the respondent relied upon the decision of this Court in *Re Knowles*, [1938] O.R. 369, [1938] 3 D.L.R. 178, but in this latter case the circumstances are not as here present. There the gift was for a definite purpose considered to fall within the charitable category and as the learned author at p. 277 of Theobald, *supra*, continues: ". . . gifts for specified public purposes are in many cases valid."

The appeal is therefore allowed and the learned trial judge's order is varied accordingly. Costs of all parties, including those of the executor as between solicitor and client, to be paid out of the estate.

HOGG J.A.:—I have had the privilege of reading the reasons for judgment of my brother Hope, in which he sets out the relevant paragraphs of the will in question and the facts required



for the consideration of this appeal. I agree with his disposition of the matter and with the reasons he has given therefor. I would like to take part, but briefly, in the discussion of the principles involved.

As to the legacy to the Exeter district hospital committee of the sum of \$1,000, this amount is to be paid upon the fulfilment of a condition. In *Milburn et al. v. Grayson et al.*, 62 S.C.R. 49, 60 D.L.R. 181, [1921] 2 W.W.R. 596, the matter before the Supreme Court of Canada was the interpretation of certain paragraphs in the will of one William Walsh. Anglin J. (afterwards C.J.C.) said at p. 62: "The testator provided for revocation of the legacies upon the happening of a single condition . . . The only safe course—the only course open to us—is to adhere strictly to the intention expressed and that is that revocation should ensue if, but only if, the condition prescribed has been entirely fulfilled."

According to the intention expressed in the paragraph of the will under consideration, the condition attached to the gift of \$1,000 does not completely fail because there was in existence an Exeter district hospital committee which had already raised the sum of approximately \$3,000 towards the erection of a public hospital in or near the village of Exeter.

With respect to the second paragraph of the will, dealing with the residue of the testator's estate, the first problem which presents itself is whether, taking into account the language and terms of the whole of the will and codicil of the late Richard Eacrett, the phrase "for civic betterment" should be held to have only a charitable character. The will directs the trustees to pay a number of pecuniary legacies, and the remainder of the estate is disposed of according to the provisions of the paragraphs that are now before the Court. It is true that the testator provided that the executor or trustee might devote the whole of the residue of the estate to charitable purposes, but the testator, in the alternative, also directed that his executor and trustee could, in his sole discretion, use the whole of the residue solely "for civic betterment". As was said in *Blair v. Duncan et al.*, [1902] A.C. 37, in the House of Lords, the expression "public purposes" has a wider meaning than the expression "charitable purposes" and includes much that does not fall within the latter expression. The same view, I think, must be taken of the expression "civic betterment".

Lord Simonds, in the latest leading case on the subject, namely, *Williams' Trustees v. Inland Revenue Commissioners*, [1947] A.C. 447, [1947] 1 All E.R. 513, in the House of Lords, quoted Viscount Cave L.C. in *Attorney-General v. National Provincial and Union Bank of England et al.*, [1924] A.C. 262, as follows: "So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust."

I think that the phrase "for civic betterment" is synonymous with the expressions "for public purposes beneficial to the community" or "for the public welfare".

I have come to the conclusion, not without some hesitation, that the terms of the will and codicil do not show the manifest intention of the testator to be that the residue was to be devoted to charitable purposes only and that when he gave discretion to his trustee to use the whole of the residue, if the trustee saw fit to do so, for the purpose of "civic betterment", such residue was to be expended entirely for the advancement of some charitable purpose that could be included within the expression "civic betterment"; in other words that the civic betterment must take the form of some charitable object. Such being the case, that line of decisions must be followed which holds that a discretion left to a trustee to apply the whole of a gift either to charitable purposes or to other indefinite purposes such as are signified by the phrase "for civic betterment" is void for uncertainty.

The principle involved was expressed in apt language by Mr. Justice Hugh Kelly in *Re Hawkins* (1929), 36 O.W.N. 347, especially in the second alternative of the following passage at p. 348: "Likewise—and this is particularly applicable here — where the trusts are general and the charitable purposes are mixed with other purposes of such a shadowy or indefinite nature that the Court cannot execute them, or where the description includes purposes which may or may not be charitable, and a discretion is vested in the trustee, the whole gift fails."

In *Re Knowles*, [1938] O.R. 369, [1938] 3 D.L.R. 178, where the residue of an estate was placed in trust for the Municipal Corporation of the Town of Dundas for the purpose of paving certain streets and beautifying a property owned by the Town known as the "Webster Falls property", the purpose of the trust was neither vague nor indefinite, and furthermore this judgment

was pronounced some years prior to the judgment in the *Williams* case in the House of Lords, explaining and obviously qualifying Lord Macnaghten's judgment in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, upon which the *Knowles* judgment is based.

*Appeal allowed in part.*

*Solicitors for the next-of-kin, appellants: Braden & McAlister, London.*

*Solicitor for the executor: Elmer D. Bell, Exeter.*

*Solicitor for the Public Trustee: Cecil C. Carrothers, London.*

*Solicitor for the Exeter Lions Club: W. G. Cochrane, Exeter.*

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[COURT OF APPEAL.]

**Rex v. Cullen.**

*Criminal Law—Appeals by Attorney-General—Appeal on Ground of Misdirection where no Objection Made to Charge by Crown Counsel at Trial—The Criminal Code, R.S.C. 1927, c. 36, s. 1013(4), as enacted by 1930, c. 11, s. 28.*

The right of appeal granted to the Attorney-General by s. 1013(4) of The Criminal Code, as enacted in 1930, is limited only in the respects indicated in the subsection, viz., the appeal must be upon a ground involving a question of law alone, and it must be in respect of an indictable offence. There is no provision in the subsection, and it is not the law apart from the subsection, that the Attorney-General may not appeal upon grounds of misdirection if counsel appearing for the Crown at the trial did not object to the charge. *Rex v. Fleming* (1945), 61 B.C.R. 464; *Rex v. Munroe* (1940), 54 B.C.R. 481, not followed; dissenting judgment of Martin J.A. in *Rex v. Bourgeois*, [1937] 2 W.W.R. 97, and *Rex v. Rasmussen* (1935), 9 M.P.R. 41, agreed with.

*Criminal Law—Choking with Intent to Commit Rape—Consent of Prosecutrix—The Criminal Code, R.S.C. 1927, c. 36, s. 276(a).*

Where an accused is charged, under s. 276(a) of The Criminal Code, with attempting to render a girl unconscious or incapable of resistance by choking her, with intent to enable him to commit rape upon her, it is misdirection for the trial judge to tell the jury that the girl's consent, if established, is a defence to the charge. The offence charged is not in the nature of attempted rape, but is a charge of making an attack which, if committed, is in itself a criminal act, and cannot be rendered lawful because the victim consents. Nor is consent material upon a charge of indecent assault, arising out of the same circumstances. *Rex v. Donovan*, [1934] 2 K.B. 498, applied.

*Evidence—Corroboration—When Required—Choking with Intent to Commit Rape.*

There is no statutory requirement of corroboration on a charge of choking with intent to commit rape, under s. 276(a) of The Criminal Code, or on a charge of indecent assault under s. 292(a), nor is there any rule of practice requiring the trial judge to warn the jury that it



is unsafe to convict on the uncorroborated evidence of the complainant on a charge under the former section. Such an instruction to the jury is misdirection necessitating a new trial.

AN APPEAL by the Attorney-General from the acquittal of the respondent, before Wilson Co. Ct. J. and a jury, on charges under ss. 276 (a) and 292(a) of The Criminal Code, R.S.C. 1927, c. 36.

23rd and 24th September 1948. The appeal was heard by HENDERSON, LAIDLAW and HOGG JJ.A.

*W. B. Common, K.C.*, for the Attorney-General, appellant: The trial judge misdirected the jury in four respects:

1. He charged them that it was unsafe to convict on either charge on the uncorroborated evidence of the complainant.

2. He told them that the consent of the complainant, if established, would constitute a defence to the charge under s. 276(a).

3. He told them that there were only three possible verdicts—conviction on one or other of the counts, or acquittal. He should have charged them as to included offences, particularly assault causing actual bodily harm and common assault, of either of which they might have convicted on this indictment.

4. He failed entirely to define either rape or indecent assault.

*J. W. Graham*, for the accused, respondent, on a preliminary objection: This appeal is based wholly upon alleged misdirection, and since no objection was taken to the trial judge's charge by counsel appearing for the Crown at the trial, the appeal cannot be entertained: *Rex v. Fleming*, 61 B.C.R. 464, 84 C.C.C. 360, [1945] 2 W.W.R. 572, [1945] 4 D.L.R. 800; *Reg. v. Fick* (1866), 16 U.C.C.P. 379; *Rex v. Hill*, 61 O.L.R. 645 at 649, 49 C.C.C. 161, [1928] 2 D.L.R. 736; *Rex v. Munroe*, 54 B.C.R. 581, 73 C.C.C. 357, [1940] 2 W.W.R. 1, [1940] 2 D.L.R. 579. The Crown cannot be permitted to remake its case: *Wexler v. The King*, [1939] S.C.R. 350 at 357, 72 C.C.C. 1, [1939] 2 D.L.R. 673, 45 R. de Jur. 373; *Savard and Lizotte v. The King*, [1946] S.C.R. 20, 85 C.C.C. 254, 1 C.R. 105, [1946] 3 D.L.R. 468.

Until 1930 there was no right to appeal against an acquittal. Subss. 4 and 5 of s. 1013 of The Criminal Code, R.S.C. 1927, c. 36, were first enacted by 1930, c. 11, s. 28. The procedure constitutes a substantial departure from the common law, as illustrated in *Reg. v. Fick*, *supra*, and stated in *Rex v. Reddin* (1910), 16 C.C.C. 163 at 166. The Crown must therefore be



strictly confined within the phraseology of the statute: *Wexler v. The King*, *supra*. [LAIDLAW J.A.: What was held in the *Wexler* case was that the Crown was not entitled to a new trial in order to put forward a wholly new case against the accused. That is slightly different.] *White v. The King*, [1947] S.C.R. 268, 89 C.C.C. 148, 3 C.R. 232, is entirely different from the case at bar, but it is nevertheless helpful. Here there is no wrong "decision" on a point of law, and the Crown can succeed only if it brings itself within clause (a) or (c) of s. 1014(1).

[As to the merits of the appeal:] 1. The charge, taken as a whole, does not amount to a direction that corroboration is required as a matter of law. It is undoubtedly desirable that there should be corroboration on such a charge: *Rex v. Jones* (1925), 19 Cr. App. R. 40; *Rex v. Reeves*, 57 B.C.R. 90, 77 C.C.C. 89, [1942] 1 D.L.R. 713. It is quite as unsafe to convict on a charge under s. 276(a) on the uncorroborated evidence of the complainant as it is in a case of rape or indecent assault. The trial judge emphasized the circumstantial evidence, and put the issue of credibility clearly to the jury.

2. Consent is a defence to a charge of rape, and, except in a very few cases, to any assault. It is difficult to see in this charge any constituent elements other than those two. There was no misdirection in this respect.

3. Indecent assault might be included in the first count, and the trial judge expressly told the jury that if they found the accused not guilty on that count they should consider the second count. It is hard to see how the jury, having acquitted on these two counts, could have convicted of any other offence.

The Crown has not shown any miscarriage of justice, within the meaning of s. 1014(1)(c), sufficient to outweigh the fundamental common law right of an accused person not to be put twice in jeopardy for the same cause.

*W. B. Common, K.C.*, in reply: I ask the Court to refuse to follow *Rex v. Fleming*, *supra*, and *Rex v. Munroe*, *supra*, which, in my submission, are wrongly decided. There is no discussion in either of those cases of the effect of the 1930 amendments. In *White v. The King*, *supra*, Kerwin J., at p. 155 (C.C.C.), points out that effect must be given to the will of Parliament in permitting appeals against acquittals. Except for the limitation to ques-

tions of law, the Crown as an appellant stands in precisely the same position as a convicted person.

*Cur. adv. vult.*

10th December 1948. HENDERSON J.A.:—I have had the privilege of reading the opinions of my brothers Laidlaw and Hogg, and I agree with their conclusions.

LAIDLAW J.A.:—This is an appeal by the Attorney-General for the Province of Ontario from the verdict of acquittal of the respondent after trial on the 8th and 9th June 1948, before his Honour Judge F. W. Wilson and a jury, in the Court of General Sessions of the Peace for the County of Lanark, on an indictment containing two counts, namely, that he, “with intent to enable him to commit rape on one Doreen McMunn, did attempt to render the said Doreen McMunn unconscious or incapable of resistance by choking her, contrary to the provisions of Section 276A of the Criminal Code of Canada”, and that he did “unlawfully and indecently assault Doreen McMunn, a female, contrary to Section 292(a) of the Criminal Code of Canada”. The grounds of appeal, as set forth in the notice of appeal, are that the learned judge misdirected the jury (1) “in that corroboration of the complainant’s story was required”; (2) “by charging them that consent was a defence or an element in respect to the charge under Section 276A”; (3) “in that they were directed that the only verdict on the two charges could be guilty or not guilty and [in that he] failed to charge the jury that they could convict the accused of included offences”. The appeal was also brought on the further ground: “That the jury were not directed as to the definition of rape and indecent assault.”

After counsel for the Attorney-General stated the grounds of the appeal, counsel for the respondent took the objection that no appeal lay to this Court from the verdict of acquittal because no objection was taken to the charge by counsel appearing for the Crown at trial.

The question whether or not the right of appeal given to the Attorney-General by s. 1013(4) of The Criminal Code is forfeited by the failure of counsel for the Crown at trial to take objection in respect of the point or points of law involved in the appeal has not been the subject of decision in this Province, and is one of much importance. It has been decided in the Court of Appeal for

British Columbia in *Rex v. Fleming*, 61 B.C.R. 464, 84 C.C.C. 360, [1945] 2 W.W.R. 572, [1945] 4 D.L.R. 800, that (as stated in the D.L.R. headnote): "The Crown is precluded from appealing from an acquittal on the ground of misdirection as to the law by the trial Judge where no objection thereto was taken by counsel acting for the Crown at the trial." Counsel for the respondent relies on the decision in that case and on the judgments of Martin C.J.B.C. and Sloan J.A. in *Rex v. Munroe*, 54 B.C.R. 481, 73 C.C.C. 357, [1940] 2 W.W.R. 1, [1940] 2 D.L.R. 579. He referred also to *Wexler v. The King*, [1939] S.C.R. 350, 72 C.C.C. 1, [1939] 2 D.L.R. 673, 45 R. de Jur. 373 and *Savard and Lizotte v. The King*, [1946] S.C.R. 20 at 33-4, 85 C.C.C. 254, 1 C.R. 105, [1946] 3 D.L.R. 468.

Before considering the purpose and effect of s. 1013(4), it is desirable and helpful to mention and bear in mind certain accepted principles of our law. First, prior to the enactment of s. 1013(4) by 1930, c. 11, s. 28, there was no right of appeal from a decision of a Court of competent jurisdiction dismissing a criminal charge or from a verdict of acquittal, even though such decision or verdict was erroneous. Second, the creation of such right of appeal by way of exception to the general rule requires express legislation in very clear language. The decisions showing the application of those principles are reviewed by Viscount Simon L.C. in *Benson v. Northern Ireland Road Transport Board*, [1942] A.C. 520 at 526, 528, [1942] 1 All E.R. 465, referred to in *Rex v. The Keepers of the Peace and Justices for the County of London*, [1945] K.B. 528 at 537, [1945] 2 All E.R. 298. Finally it is important to keep in mind a third principle which I find stated by Cockburn C.J. in *Martin v. Mackonochie* (1878), 3 Q.B.D. 730 at 775, in these words: "In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law."

I now consider the provisions of s. 1013(4). The language employed in the subsection leaves no room for doubt as to its meaning or as to the intention of Parliament. The Attorney-General is given "the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone". That right exists by express provision "notwithstanding anything in this Act [The Criminal Code]



contained". It is limited by the language of the subsection in two respects only, namely: the appeal must be on a ground which involves a question of law alone, and it must be in respect of an indictable offence. Subject to that limitation, the Attorney-General is given the right to appeal against any judgment or against any verdict of acquittal of a trial Court whether the trial be with or without a jury. The exercise of the right is not made dependent, by the language of the subsection, upon the existence of any conditions. The right is not qualified by the use of such language as one would expect if the intention of Parliament had been to restrict its exercise. In particular, there is no express stipulation or provision that the right of appeal created by the enactment is exercisable only if counsel for the Crown at trial took objection at that time in respect of the point or points of law involved in the appeal. The language of the legislation is clear and explicit and ought to be given full effect. The Court should not import into the subsection a proviso or condition which is not contained in it.

The purpose of the legislation is to see that justice is done in accordance with the law. It is fundamental in the administration of criminal justice that no person shall be convicted except in accordance with the law, but it is of equal public importance and concern that no person shall be acquitted in any other way. It is a matter of great consequence to society that a person who may be guilty of an indictable offence should not escape justice by a judgment or verdict of acquittal which is not in accordance with the law. In the first instance it is the duty and responsibility of a judge at trial to see that there is no error in law leading to a conviction or to a judgment or verdict of acquittal, and in the event of a complaint by way of appeal that such error exists, it then becomes the duty and responsibility of a Court of Appeal to consider and determine the matter.

The duty and responsibility of a judge at trial, as stated, cannot properly be placed upon counsel appearing there for the Crown, and it is inconceivable to me that the Court of Appeal should refuse to entertain an appeal and thus permit a possible miscarriage of justice merely because counsel appearing for the Crown at trial has omitted to take an objection in respect of a point of law. I cannot accept the argument that counsel for the Crown at trial accepts an erroneous charge or acquiesces in an



error in law by his silence, so as to preclude the Attorney-General from taking an objection on appeal to this Court. On the contrary, if on review of the proceedings at trial it appears to the Attorney-General that there is an error in law, it becomes his duty in the event of a judgment or verdict of acquittal of a trial Court to appeal to the Court of Appeal, and it thereupon becomes the duty of the Court of Appeal to consider and determine if such error exists and whether a substantial miscarriage of justice has actually occurred.

It has been decided that the failure of counsel for an accused person to object at trial does not necessarily cause the right to object on appeal to be forfeited. I refer only to *Stirland v. Director of Public Prosecutions*, [1944] A.C. 315, [1944] 2 All E.R. 13, 30 Cr. App. R. 40. The question in that appeal was the admissibility of certain evidence, and the reasons stated by the Lord Chancellor (Viscount Simon) apply with equal force to the question now before this Court for decision. The Lord Chancellor said, at pp. 327-8:

"It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself: see *Rex v. Ellis*, [1910] 2 K.B. 746, 764. If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as was said in the same case, the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal, but where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice. There is nothing in the Act of 1898 to suggest that such an objection is necessarily invalid unless taken at the time, and in other branches of the law the right to object on appeal that evidence was inadmissible is not necessarily forfeited by the failure to object when the evidence was given. The object

of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and, if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive."

It was urged that a person who has been acquitted after trial in a court of competent jurisdiction should not be put in jeopardy a second time. I cannot accept that argument because it is plain that the right of appeal given to the Attorney-General by s. 1013(4) is for the very purpose of putting the accused in jeopardy in a new trial, if the Court of Appeal in the exercise of its power so directs. Harvey C.J.A. in *Rex v. Curlett*, [1936] 2 W.W.R. 528, 66 C.C.C. 257 at 258, [1936] 3 D.L.R. 199, points out that an appeal by the Crown "is made for the purpose of putting an acquitted person a second time in jeopardy".

I reach the conclusion that the right of appeal created by s. 1013(4) in favour of the Attorney-General may be exercised by him, and the Court of Appeal should entertain the appeal, notwithstanding the failure of counsel appearing for the Crown at trial to take an objection in respect of the point or points of law involved in the appeal. My opinion has been formed after careful study and consideration of the decision in *Rex v. Fleming supra*, and the reasons for judgment of the late Chief Justice Martin and Mr. Justice Sloan (now Chief Justice of British Columbia) in *Rex v. Munroe, supra*. My opinion is in direct conflict with those judgments, and with the greatest respect I am impelled to differ from them and must decline to follow them in the case presently before this Court. I have also considered the views expressed in *Rex v. Bourgeois*, [1937] 2 W.W.R. 97, 69 C.C.C. 120, [1937] 4 D.L.R. 553, and prefer the opinion expressed in the dissenting judgment of Martin J.A. (now Chief Justice of Saskatchewan) and also the opinion which the Appellate Division of the Supreme Court of New Brunswick appears to have had in *Rex v. Rasmussen*, 9 M.P.R. 41, 62 C.C.C. 217, [1935] 1 D.L.R. 97.

Since my opinion, as above expressed, was formed I have had the opportunity of perusing the reasons for judgment of my brother Hogg, and now state my agreement with his views and conclusions. His full and carefully-prepared judgment makes it quite unnecessary for me to discuss the merits of the appeal. It

is quite plain to me that there was serious misdirection in the charge to the jury in matters of law and that there was a mistrial. I would, therefore, set aside the verdict of acquittal and direct a new trial.

HOGG J.A.:—The Crown appeals from the acquittal of the respondent by a jury at his trial at the Court of General Sessions of the Peace for the County of Lanark, presided over by his Honour Judge Wilson, upon an indictment charging, first, that the respondent, with intent to enable him to commit rape on one Doreen McMunn, attempted to render her unconscious or incapable of resistance by choking her, contrary to s. 276(a) of The Criminal Code; and second, that the respondent committed an indecent assault upon the said Doreen McMunn, contrary to s. 292(a) of the Code. The appeal is brought under the authority of s. 1013(4) of the Code. The principal grounds of appeal are based upon alleged misdirection of the jury by the learned trial judge in that he charged them, (1) that corroboration of the complainant's testimony was required, and (2) that consent was a defence or an element to be considered in respect of the charge under the aforesaid s. 276(a).

Counsel for the respondent raised the preliminary objection that upon an appeal by the Crown from the acquittal of an accused person, the failure of counsel for the Crown at the trial to take objection to the manner in which the case was presented to the jury by the trial judge, or to request that a particular direction be given to the jury, is ground for this Court to refuse to entertain such appeal.

Immediately after the jury had retired to consider their verdict, the following discussion took place between the trial judge and counsel:

"COURT: Are we ready to proceed then with the next?

"MR. G. R. DULMAGE [counsel for the respondent]: I was wondering if your Honour was going to afford us the opportunity of raising things that probably should have been raised with regard to your charge?

"COURT: Oh yes, yes. I have just been waiting to see if you intend saying anything.

"MR. J. A. B. DULMAGE [counsel for the Crown]: I have nothing to say."



It is superfluous to state that counsel for the respondent did not raise the objections in question.

Before entering upon a consideration of the question whether this Court labours under any rule which prevents it from hearing the appeal by the Crown, as is contended on behalf of the respondent because of reasons already stated, it should first be determined whether there is substance in the grounds, or any of them, for appeal advanced by the Crown, for if not it will be unnecessary to deal with the preliminary objection made by counsel for the respondent.

With respect to the alleged misdirection of the jury on the part of the learned trial judge, that consent was a defence in respect of the charge made against the respondent under s. 276(a) of The Criminal Code, the material part of the charge to the jury reads:

"Now, as I understand the defence to both these charges, it is that the girl consented and secondly, the accused's condition from drinking . . . Now, as to both these charges, I think as to both of them, if the girl consented that is a defence with the exception, I think, and my attention will be drawn to what I am saying later if it is thought I am wrong, as to the first charge that is the one with intent to commit rape choking so as to render unconscious or incapable of resistance, that if the consent there is brought about by threats and fear so that you find, you feel you should find, it is not a real consent, then it isn't consent. Now, in this matter of consent, the mere fact that the girl puts up some resistance it seems to me doesn't necessarily indicate that she has not consented. She might make a mild sort of physical protest not wanting to indicate too readily a surrender of her virtue and still be willing enough that the action occur. The point for you to decide is whether or not in fact on the evidence you believe there was or was not consent, on the conduct and evidence otherwise pertinent to that."

Section 276(a) of the Code is in part as follows:

"Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped, who with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing, any indictable offence,



“(a) by any means whatsoever, attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance.”

The crime may consist, as is alleged in this case, of an attempt to render a person incapable of resisting by choking, with intent on the part of the person doing such act of violence to enable him to commit an indictable offence. The question therefore is whether the element of consent enters into this particular offence, not whether consent is a material factor with respect to the intended crime itself. Apart from any authority upon the subject, one can hardly conceive of a woman consenting to be choked into insensibility. The assault, consisting of the act of choking, is done, not to secure the consent of the person who is choked to the intended crime, whether such intended crime is rape or attempted rape or another offence. It is done to enable the perpetrator of the assault to commit the intended crime regardless of consent, because the victim has been rendered insensible or incapable of resistance.

The matter of consent with reference to the crime of indecent assault and of common assault upon a girl of the age of seventeen was considered and discussed by the Court of Criminal Appeal, consisting of Lord Hewart C.J. and Swift and du Parcq JJ., in *Rex v. Donovan*, [1934] 2 K.B. 498. The appellant was charged with caning a girl of seventeen for purposes of sexual gratification and pleaded in defence that the prosecutrix had consented. Mr. Justice Swift read the judgment of the Court, and said at p. 502: “The defence was that it lay upon the prosecution to prove absence of consent, and that in fact the girl had consented to everything that was done by the appellant.” And at p. 504: “. . . the jury returned into Court, and the chairman summed up to them upon the footing that the question ‘consent or no consent’ was the vital issue.” He then said, at p. 506:

“We have given careful consideration to the question of law which this submission raises. The learned counsel on both sides referred us to passages in the judgments in the case of *Reg. v. Coney*, 8 Q.B.D. 534, 539 . . . the judgments undoubtedly contain statements of the law which are of great value for the present purpose. Much reliance was placed, on behalf of the Crown, upon the following passage from the judgment of Cave J.: ‘The true

view is, I think, that a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial' . . . If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer . . . As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."

With the greatest respect for the opinion of the learned trial judge, the offence which is the subject of s. 276(a) of the Code, and with which the respondent was charged in the first count of the indictment, was not in the nature of attempted rape. It was an alleged attempt by the respondent to render the young woman unconscious, or incapable of resisting, by choking, in order to further the intention, which it is alleged he had, to commit an indictable offence, namely, rape or attempted rape upon her. There is evidence which a jury would have to consider in determining whether the attack made upon the girl was with such a degree of violence that bodily harm was done to her or was a probable consequence. The assault upon Doreen McMunn with which the respondent is charged, under s. 276(a), was, if committed, a criminal act in itself and could not be rendered lawful because she consented thereto. It is my opinion that the element of consent does not enter into the offence with which the respondent was charged under s. 276(a) of the Code, nor can it be an element in the offence charged under s. 292(a), because of the nature of the attack upon the girl.

With reference to the further ground of appeal, that the jury was misdirected when told that corroboration of the complainant's story was required, the Code itself does not require corroboration where the offence charged is under s. 276(a), nor

do I know of any rule which makes the common law rule regarding corroboration applicable to an assault of this particular kind, as is the case when the offence charged is rape or attempted rape.

With respect to the charge of indecent assault, under s. 292 of the Code, corroboration is required by the statute when an assault of such nature is alleged to have been made upon a child of tender years who does not, in the opinion of the Court, understand the nature of an oath, but otherwise corroboration of an offence under s. 292(a) is not required by the Code, s. 1002: *Rex v. Druz*, (1928), 34 O.W.N. 119.

The trial judge charged the jury upon the matter of corroboration, as follows: “. . . it is my duty, I think, to charge you that it is unsafe—I don’t know there is any statute that says you must have corroboration in connection with either of these two charges, but speaking as a matter of common sense and common experience and observation and practice in the courts, it is the duty of the judge to tell you that it is dangerous, it is unsafe, to convict on the evidence of the girl alone, unless it is corroborated by other evidence implicating the accused as to the offence charged. That doesn’t mean that everything, that all the essentials must be corroborated but there must be corroboration to the extent that you feel, you find there is indication of implication of his guilt of the offence charged.”

In my opinion there was a misdirection as to the law of a serious character with reference to the matters of consent and of corroboration, in so far, at least, as corroboration relates to the offence charged in the first count of the indictment. The misdirection is especially grave with reference to the offence alleged to have been committed under s. 276(a) of the Code, which I think would impress a jury as the more heinous of the two offences with which the respondent was charged. Adopting the words of Mr. Justice Rand in *McIntyre v. The King*, [1945] S.C.R. 134 at 143, 83 C.C.C. 97, [1945] 1 D.L.R. 631, the misdirection was, “of such a nature that we are quite unable to say that it might not have influenced the jury in reaching their verdict”. I do not think the verdict would necessarily have been that brought in by the jury if such jury had been properly directed. I do not think it necessary to discuss the several other grounds of appeal.



Turning now to a consideration of the objection made by counsel for the respondent at the opening of argument upon the appeal, there are several decisions of the Court of Appeal of another Province of the Dominion, dismissing appeals by the Crown from the acquittal of an accused for the reason that although there were objectionable features in the charge by the trial judge to the jury, counsel for the Crown at the trial had taken no objection to such charge.

In *Rex v. Munroe*, 53 B.C.R. 481, 73 C.C.C. 357, [1940] 2 W.W.R. 1, [1940] 2 D.L.R. 579, in the Court of Appeal of British Columbia, the opinion was expressed by Martin C.J.B.C. and Sloan J.A. (now C.J.) that Crown counsel could not remain silent at the trial and allow misdirection by the trial judge, upon a matter favourable to the accused, to pass without objection, and subsequently request a new trial on the ground of such misdirection. In *Rex v. Fleming*, 61 B.C.R. 464, 84 C.C.C. 360, [1945] 2 W.W.R. 572, [1945] 4 D.L.R. 800, in the same Court, the same opinion was unanimously upheld. On the other hand, in *Rex v. Rasmussen*, 9 M.P.R. 41, 62 C.C.C. 217, [1935] 1 D.L.R. 97, Barry C.J.K.B., in the Appellate Division of New Brunswick, was of the opinion that the rule that because counsel for the prosecution did not ask the trial judge to direct the jury in the manner in which it was later claimed upon the appeal he should have directed them, the Crown could not complain, although it had been followed in civil cases, was merely a rule of procedure and not an inflexible one, and should not apply in criminal cases.

The maxim *nemo debet bis vexari pro uno et eadem causa*—no one should be tried twice for one and the same cause—was invaded by Parliament when the right was conferred upon the Crown of appealing from the acquittal of an accused and the appellate Court was given the right to order a new trial.

The provisions of subs. 5 of s. 1013 as enacted by 1930, c. 11, s. 28 are material in the consideration of the problem under discussion. This subsection reads: "The procedure upon such an appeal [by the Crown against acquittal] and the powers of the court of appeal, including the power to grant a new trial, shall *mutatis mutandis* and so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by sections one thousand and twelve to one thousand and twenty-one of this Act, inclusive, and



the Rules of Court passed pursuant thereto, and to section five hundred and seventy-six of this Act." The procedure and the powers of the Court of Appeal, subject to the limitation imposed by the subsection itself, are similar upon an appeal by the Crown to the procedure and powers given to the Court upon an appeal by a person convicted on indictment.

In *White v. The King*, [1947] S.C.R. 268, 89 C.C.C. 148, 3 C.R. 232, the Court of Appeal for Ontario had allowed an appeal by the Crown from the acquittal of the accused on a charge of indecent assault and directed a new trial upon the same charge. An appeal was taken by the accused to the Supreme Court of Canada. Mr. Justice Kerwin, at p. 276, expressed the following opinion:

"Without in any way weakening the salutary rule that an accused is entitled to the benefit of a doubt as to his guilt, effect must be given to the will of Parliament in permitting appeals from acquittals and to the provisions of subsection 2 of section 1014 Cr. C. by which, according to the terms of subsection 5 of section 1013 Cr. C., the powers of a court of appeal are, *mutatis mutandis* and so far as the same are applicable to appeals upon a question of law alone, to be similar to the powers given by the former. Applying those provisions to the present case, the proper rule to be followed by the Court of Appeal was that the onus was on the Crown to satisfy the Court that the verdict would not necessarily have been the same if the magistrate had properly directed himself."

By the terms of s. 1014(1) (c) of the Code, the appellate Court shall allow the appeal if it is of the opinion that on any ground there was a miscarriage of justice. This subsection is applicable to the present case because of the provisions of subs. 5 of s. 1013 in so far as the miscarriage of justice involves a question of law.

The power of the appellate Court to direct a new trial is specifically referred to in s. 1013(5).

In *Stirland v. Director of Public Prosecutions*, [1944] A.C. 315, [1944] 2 All E.R. 13, 30 Cr. App. R. 40, in the House of Lords, the appellant had been convicted of forgery. The point of law involved in the appeal was as to the admissibility of certain questions put in cross-examination of the appellant at the trial after he had put his character in issue. One of the questions raised in the appeal was whether the conviction could be quashed on the ground of the improper admission of evidence prejudicial

to the prisoner where no application had been made at the time by counsel for the prisoner, for the trial to be begun again before another jury. No such application had been made. Viscount Simon L.C. said, at p. 328:

“The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel’s discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal, but where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice . . . The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive.”

Although in the present case the error on the part of the trial judge in the misdirection of the jury might well have influenced them to acquit the appellant of the offences with which he was charged, nevertheless, if the contention of counsel for the respondent is upheld, no remedy is available for such miscarriage of justice.

It seems to me that the matter resolves itself into the question whether a miscarriage of justice is to be without a remedy and justice is not to be done according to law, solely because the general rule in civil cases is to be regarded as an inflexible rule in criminal appeals and that, therefore, the appeal must be dismissed by this Court because counsel for the Crown at the trial did not enter objection to the trial judge’s charge to the jury.

Because of the provisions of subs. 5 of s. 1013 and s. 1014(1) (c) of the Code and upon the authority of *White v. The King*, *supra*, and furthermore because of the statement I have already quoted of Viscount Simon L.C. in the *Stirland* case, the fact that objection was not taken by counsel for the Crown to the trial judge’s charge, in my view, to use the words of the Lord Chancellor, “is not necessarily conclusive”.

The appeal should be allowed and there should be a new trial.

*New trial ordered.*

*Solicitor for the Attorney-General, appellant: W. B. Common, Toronto.*

## [COURT OF APPEAL.]

**Payne and Payne v. Maple Leaf Gardens Limited,  
Stewart and Marucci.**

*Negligence—Dangerous Premises—Duty and Liability of Invitor—Arena for Playing of Games, etc.—Limits of Duty towards Spectators.*

*Trespass—Liability—Improper Conduct and Negligence—Spectator at Hockey Game Injured in Consequence of Fight between Players—Breach of Rules of Game.*

There is no absolute warranty on the part of an occupier of premises who invites others to use the premises to see a game or other spectacle that the premises are safe. He is under a duty to see that reasonable skill and care have been used to make them safe, and to guard against such dangers as may reasonably be anticipated. He is not required to guard against every possible danger. *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205, applied.

During a game of hockey in a public arena a fight broke out between two players, S and M, over a hockey stick. Both had dropped their sticks and M had recovered his own when S, thinking that the stick that M was holding was his (S's) attempted to take it from him. A struggle ensued, during which the players moved over close to the boards at the edge of the ice and a spectator sitting next to the boards was injured by the stick. The spectator sued the company which operated the arena, and both the players.

*Held*, the action must fail as against the company and M, but should succeed as against S.

As to the company, the action was framed on the basis of a breach of duty in respect of the safety of the premises, but no case had been made out on that ground. There was no evidence that a spectator had ever before been injured in this way, nor did the evidence show any failure on the part of the company or its employees to take reasonable care to make its premises reasonably safe for spectators.

The case against the two players was based upon an allegation that the injuries were due to an assault or negligence on their part, arising from their engaging in an illegal struggle. As to S, he had attacked M in an effort to get possession of a stick, without making any effort to discover (as he could easily have done) whose stick it was. He knew that people were gathered around him and that those in the front row were only a short distance away. There was a reckless disregard on his part for their safety, and the plaintiff's injuries resulted directly from his negligence or improper conduct. The fact that he was a player made no difference to his liability, because at the time of the attack the play was at the other end of the rink, S was not engaged in the course of play, and his acts were contrary to the rules of play. He was in no better position than if the wrongful acts had occurred after the game was over. There was, however, no fault to be found on M's part. He was not the aggressor at any stage of the struggle, and it did not appear that he did anything more than attempt to retain possession of his own property.

AN APPEAL by the plaintiffs from the judgment of Lebel J., after trial without a jury, dismissing the action as against all the defendants.

10th November 1948. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and AYLESWORTH JJ.A.

*R. F. Wilson, K.C.*, for the plaintiffs, appellants: As against the corporate defendant, this is not an action against a sporting



club, but one against a corporation operating for profit. There is an implied contract because of the sale of tickets. There was no warning on the ticket, and the only protection for spectators was a board barrier about 4½ feet high. There was a screen at the south end of the rink, and this has now been extended all around. [ROBERTSON C.J.O.: That is not evidence of negligence; the company may now be taking more than reasonable care.] The occupants of rail seats must realize that there is danger of the puck coming over the boards, or even that there may be danger resulting from body-checking, but they have a reasonable opportunity to protect themselves against such dangers. They had no such opportunity here, and the maxim *volenti non fit injuria* has no application. The company was an invitor, and it was negligent in giving no warning to the occupants of rail seats and in failing to take reasonable precautions for their protection.

[LAIDLAW J.A.: Assuming that there was a failure to give a warning, and that that failure was unjustified, you still must show that it was a contributory cause of the accident.] The duty of an invitor is based upon *Indermaur v. Dames* (1867), L.R. 2 C.P. 311. It is true that the female plaintiff had seen the puck come over the boards on other occasions, but that is a different situation. In that case a spectator, watching the puck as the focal point of the game, would have an opportunity to protect herself. But here she was watching the play and something occurred which was not part of the play, but a collateral struggle, and she had no opportunity to protect herself. The principle of *volens* applies only where the plaintiff knows of the danger, and accepts it, and it is in this connection that the absence of a warning is material. [ROBERTSON C.J.O.: Surely the duty of the company would only be to give warning of concealed danger of which it had, and the invitee had not, knowledge.] *Brown and Brown v. B. and F. Theatres Limited*, [1947] S.C.R. 486 at 490, [1947] 3 D.L.R. 593, draws a distinction according to whether or not the invitee pays for the privilege. In *Cincinnati Baseball Club Co. v. Eno* (1925), 147 N.E. 86, it was held that one could not watch two places at once, and so protect oneself from injury. *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205, is distinguishable on several grounds. There, the invitee was given a choice as to where he would sit, the injuries complained of were the direct result of the auto racing, and not caused by any collateral action,



and it was found that the car was thrown into the air with such force that no barrier, however strong, would have afforded protection.

As to the inapplicability of the maxim *volenti non fit injuria*, I rely upon *Harrison v. Toronto Motor Car Limited and Krug*, [1945] O.R. 1 at 9, [1945] 1 D.L.R. 286. The doctrine has never been applied where it is not shown in the evidence that the plaintiff had full knowledge of the risk, and accepted it.

As to the individual defendants, the action is based upon an allegation of assault, with an alternative claim based on negligence. They were participating in a struggle collateral to the game, and failed to exercise reasonable care. They were reckless as to whether or not anyone was hurt. They owed a duty to the spectators. As between the two, the responsibility of Stewart is probably the heavier, since the stick was in fact Marucci's, and Stewart received a penalty for violation of the rules of the game. It is sufficient, however, if both are shown, as I submit they are, to be in the wrong: *Arneil et al v. Paterson et al.*, [1931] A.C. 560. All parties had to be brought before the Court so that it might be ascertained which of them was responsible: *Till v. Town of Oakville* (1915), 33 O.L.R. 120, 21 D.L.R. 113.

*B. V. Elliot, K.C.*, for the defendants Maple Leaf Gardens Limited and Stewart, respondents [directed by the Court to limit his argument to the case against the respondent Stewart]:—The trial judge found that Stewart was not negligent, and his finding should not be disturbed. The case is very similar to *Hall v. Brooklands Auto Racing Club*, *supra*. The players were intent upon satisfying both the spectators and their team-mates, and the loss of a few seconds might mean the loss of the game. In the heat of the moment they were thinking only of getting back into the play. The rules are made for the players, not for the benefit of spectators. [LAIDLAW J.A.: What Stewart did was not done in the course of play. He must have been violating the rules, because a penalty was imposed by the referee.] It cannot be called negligence to break one of the rules of the game. [LAIDLAW J.A.: If he was doing a wrong, negligence does not enter into it. The action is framed in trespass as well as in negligence.] This is different from the case of two men fighting in the street. Reasonable men do not fight in the street, but a breach of the rules of hockey is to be expected. [LAIDLAW J.A.: It cannot be said that

the plaintiffs came to see Stewart commit a wrongful act.] The game is a very active one, and all must act quickly. I refer to *Rich et al. v. Madison Square Garden Corporation et al.* (1933), 266 N.Y.S. 288, but it is not of great assistance, since it does not refer to the players.

T. N. Phelan, K.C., for the defendant Marucci, respondent: There is nothing in the evidence to show that Marucci was guilty of any breach of duty to the plaintiff. She must show that there was a breach of duty, and that the injuries resulted from that breach. The *Brooklands* case, *supra*, is in point. What would a reasonable man have done that Marucci did not do? The breach of the rules, if any, is not a breach of duty towards a spectator. [ROBERTSON C.J.O.: It may deprive a player of protection he would have had if the rule had not been broken.] The players must not be judged as men who have time to weigh the circumstances. It takes less than one second for the puck to travel from one end of the rink to the other. Marucci was doing what he was paid to do, and what the spectators expected him to do. No one knows whose action was responsible for the stick hitting the female plaintiff.

I refer also to *Ouellet v. Cloutier*, [1947] S.C.R. 521.

R. F. Wilson, K.C., in reply.

*Cur. adv. vult.*

9th December 1948. The judgment of the Court was delivered by

LIDLAW J.A.:—This is an appeal by the plaintiffs from a judgment of LeBel J., dated the 3rd June 1948, dismissing an action for loss and damages suffered by the plaintiffs as a result of injuries to the female plaintiff when she was a spectator at a hockey game and was struck by a hockey stick in the hands of one of the players. The game was being played between the Toronto "Maple Leafs" and the Chicago "Black Hawks" in Toronto in an arena owned and operated by the respondent Maple Leaf Gardens Limited. The respondent Stewart was a player on the forward line of the "Maple Leafs", and Marucci was a defence player for the "Black Hawks". The "Black Hawks" were defending the south goal. It was attacked by the "Maple Leafs", including Stewart on the forward line. During the attack, both Marucci and Stewart dropped their sticks on the ice. The play was carried

to the opposite end of the rink. Marucci recovered his own stick and Stewart, thinking that it was his, seized it and tried to take it away from Marucci. Marucci resisted Stewart's attempt to take the stick from his hands and there was a struggle between them, during which time they moved from the vicinity of the Chicago goal to the boards separating the ice from the part of the arena occupied by the spectators. The boards are about 4 feet high, and the first row of seats is about 2 feet from the boards. When Marucci and Stewart were at or near the boards, one of them let go his grip on the stick and it swung in the hands of the other player over the boards and struck the female plaintiff, who was occupying a seat in the first row. At that time she was watching the play at the opposite side and towards the other end of the rink, but was not leaning forward in her seat. She did not see the struggle between Marucci and Stewart until an instant before she was struck, and she had no opportunity to avoid the blow. When the referee saw the struggle he stopped the play. He saw Stewart's stick on the ice and instantly identified it by a number or mark on it as belonging to Stewart. He imposed a minor penalty on Stewart, requiring him to serve time out of the game for violation of one of the rules of the game.

After hearing the appeal, it was the unanimous opinion of the members of the Court that the action was properly dismissed as against the respondent Maple Leaf Gardens Limited, and that the appeal as against that respondent must be dismissed with costs. That opinion was then announced, and although the reasons for it were apparent during the course of the argument, I shall briefly restate them.

It is to be first observed that the allegation made against the respondent Maple Leaf Gardens Limited, as it appears in the statement of claim, and upon which the appellants seek to hold that respondent liable in law, is that "the injuries sustained by the Plaintiff Hilda Gladys Payne were due to the absence of any adequate protection for patrons occupying the seats in question". The whole complaint against the respondent Maple Leaf Gardens Limited is in respect of the safety of the premises. The duty of the respondent in that respect is well settled in law. There is no absolute warranty on the part of an occupier of premises who invites others to use such premises to see a game or race or other spectacle, that the premises are safe. Such an



occupier is under a duty only to see that reasonable skill and care have been used to make them safe. He is obliged to guard spectators of such events, not against every possible danger, but only against those which may reasonably be assumed possible to happen: *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205. In this case the evidence shows that accidents to spectators had happened from time to time during games of hockey in the arena of the respondent Maple Leaf Gardens Limited. Some of them were caused by the puck escaping from the playing surface of the rink into the crowd of spectators, and a lesser number were caused by a hockey stick striking a spectator seated near the boards. The respondent Maple Leaf Gardens Limited, through its officers, had knowledge of such accidents. But there is no evidence that, before the happening in question, a spectator was injured by an accident of the kind, or in the manner, presently under consideration. There is no evidence from which it could be found that any of the officers or employees of Maple Leaf Gardens Limited anticipated or ought to have anticipated any danger to a spectator seated near the boards by reason of a struggle between two players for possession of a stick in the manner described in the evidence. I think the misadventure was of so unusual and unexpected a kind that it could not reasonably have been expected. In my opinion, the evidence does not show any failure on the part of the respondent Maple Leaf Gardens Limited to take reasonable care to make its premises reasonably safe for spectators. There was no breach of duty in law owing by that respondent to the plaintiffs, and the action as against that respondent accordingly fails.

The Court reserved judgment on the question of liability of the respondents Marucci and Stewart. The case which the appellants sought to establish as against those respondents is to be clearly distinguished from the case which they endeavoured to make out as against the respondent Maple Leaf Gardens Limited. As against the respondents Marucci and Stewart, the plaintiffs alleged (as appears in the statement of claim) "that the injuries sustained by the Plaintiff Hilda Gladys Payne were due . . . to an assault by or negligence on the part of the Defendants Gaye Stewart and John Marucci arising from their engaging in an illegal struggle during the course of the hockey game". They sought to make those respondents liable for acts of mis-



conduct during the game, whereas the case against the respondent Maple Leaf Gardens Limited was based upon an alleged breach of duty in respect of the safety of the premises where the game was played.

I propose to disregard for the moment the fact that Marucci and Stewart were players on opposing teams engaged in the game of hockey. I shall then consider the effect, if any, that fact has on the question of the liability of those respondents. When the facts are considered in that way, it appears plain to me that there was negligence or improper conduct on the part of Stewart. He attacked Marucci in an effort to obtain possession of a hockey stick that belonged to Marucci. He could have discovered in a moment, and without difficulty, that the stick was not his and that his own stick was lying nearby. He did nothing to ascertain whether the stick he attempted to take from Marucci belonged to him (Stewart) or to Marucci. The sticks were marked so that they could be instantly distinguished, and it required only a glance by Stewart to identify his own stick and to see that Marucci did not have it. He knew that a large number of people were gathered around him and Marucci and that the people in the front row of the crowd were only a short distance away from him. He knew, or ought to have known, that those people were in danger of injury if he continued his struggle with Marucci. Nevertheless, he wrongfully started a fight with Marucci for possession of Marucci's stick and continued his efforts in such a way, and to such an extent, as to cause the two of them to get close to the people in the front row of the crowd and to endanger their safety. There was a reckless disregard on his part for their safety. Under such circumstances, I have no difficulty in finding that negligence or improper conduct on the part of Stewart was the direct cause of the injuries sustained by the female plaintiff. I cannot find any fault on the part of Marucci. It does not appear that he was the aggressor at any stage of the battle between him and Stewart, or that he did anything more at any time than endeavour to retain possession of his own property.

I add now to the facts upon which my findings as stated are based, the fact that Marucci and Stewart were playing members of teams engaged in the game of hockey at the time of the accident. It is well known, and appears from the evidence, that injuries to spectators do occur sometimes during the play of

hockey games. The puck sometimes escapes from the playing area into the part of the arena occupied by spectators. Sometimes, too, a spectator in the front row at the boards may be injured by a hockey stick of one of the players. Such accidents may happen in the course of play without fault on the part of any player. I think that both of the appellants must be taken to have known that accidents of that kind sometimes happen and to have assumed the risk of injuries resulting from them. They were holders of "season tickets" for the same seats in which they were sitting at the time of the happening in question, and had occupied them on many occasions before. But, while they had such knowledge and assumed such risk, it cannot be properly held that either of them assumed the risk of injuries resulting directly from negligence or improper conduct on the part of one of the players. Such a player could not properly say that they assumed a risk created by his own wrongdoing. The fact that he was one of the players in the game is no defence to him in an action for damages based upon his misconduct, for which he would be liable in law if he were not a player. It is not without importance that at the time Stewart attacked Marucci, and thereafter until the time of the accident, the puck and the play of the game were at the opposite end of the rink. Stewart was not engaged in the course of play at the time of the accident, but his acts resulting in injury to the female plaintiff were contrary to the rules of play. They may be properly regarded apart from the game, and he is in no better position in law than if the wrongful acts by him occurred after the game was over, or after the play was stopped by the referee. Indeed, the play was stopped by the referee as soon as he saw the struggle in progress between Marucci and Stewart, and he put Stewart out of the game for a penalty period for his misconduct.

I would hold Stewart liable for the loss and damages sustained by the plaintiffs. The appeal from that part of the judgment in the Court below dismissing the action against him should, therefore, be allowed with costs. The judgment of the court below should be varied and judgment should be entered against him in favour of the plaintiff Hilda Gladys Payne for the sum of \$1,250 and in favour of the plaintiff Ernest A. Payne for the sum of \$252, with costs. The appeal as against the respondent Marucci should be dismissed with costs.

*Appeal allowed with costs as against Stewart, but dismissed with costs as against the other defendants.*

*Solicitors for the plaintiffs, appellants: Day, Wilson, Kelly, Martin & Morden, Toronto.*

*Solicitors for the defendants Maple Leaf Gardens Limited and Stewart, respondents: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.*

*Solicitors for the defendant Marucci, respondent: Phelan, O'Brien and Phelan, Toronto.*

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[COURT OF APPEAL.]

**Lunn v. Barber.**

*Executors and Administrators—Foreign Administrator Suing in Ontario—When Ancillary Letters Unnecessary—Action on Promissory Notes—Necessity for Proving Deceased's Domicile and Physical Presence of Notes there at Death.*

A foreign executor or administrator who sues in Ontario upon promissory notes is relieved of the necessity for an ancillary grant of administration in Ontario only if he establishes that the deceased was domiciled in the country in which probate or administration was issued, and that the notes were in his possession in that country at the time of his death. *Crosby v. Prescott*, [1923] S.C.R. 446, explained and applied.

AN APPEAL by the defendant from the judgment of Gale J. in favour of the plaintiff, in an action upon two promissory notes.

9th September 1948. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and HOPE JJ.A.

*H. F. Parkinson, K.C.*, for the defendant, appellant: The two notes sued on were counterparts of each other—identical as to date, amount, and other respects. The plaintiff gave no evidence at the trial, but merely put in the two notes and her letters of administration, and the trial judge's findings of fact are consequently not based upon credibility. As to s. 11 of The Evidence Act, R.S.O. 1937, c. 119, the only material evidence indicates that there was a joint ownership of a mining claim, with an agreement to develop it and divide after sale. No other agreement was proved, which might have rescinded the earlier



agreement. [ROBERTSON C.J.O.: There is nothing in the agreement to link it up with the notes.] The great delay in bringing and proceeding with the action is in itself corroboration of the defendant's story. In any event, corroboration is unnecessary since this plaintiff is not one of the parties contemplated by the Act. [ROBERTSON C.J.O.: She does sue as administratrix.]

The general rule is that a foreign administrator may not sue in an Ontario court without an ancillary grant of administration here: 2 C.E.D. (Ont.), 1926, p. 675, and cases there cited. An exception is laid down in *Crosby v. Prescott*, [1923] S.C.R. 446, [1923] 2 D.L.R. 937, [1923] 2 W.W.R. 569, but the plaintiff has not brought herself within that case. If the notes were in Toronto at the time of Lunn's death, then succession duty would be payable on them in Ontario, and an ancillary grant of administration would be essential. It was not even proved that Lunn was ever domiciled in New York. [ROBERTSON C.J.O.: The plaintiff said in her evidence that Lunn lived in New York, and if the notes were there at his death she would probably be entitled to sue here.] Yes, but to bring herself within *Crosby v. Prescott*, *supra*, the plaintiff must affirmatively establish that he was domiciled in New York, and that she came into possession of the notes there with his other effects. Having failed to prove this, she cannot maintain her action.

As to corroboration, the exception in the *Crosby* case is based upon the bringing of an action by a foreign administrator, properly appointed. He does not sue, in such circumstances, as administrator, but as a person having reduced the notes into his possession, and s. 11 of The Evidence Act consequently does not apply.

*E. C. Fetzer*, for the plaintiff, respondent: The trial judge excluded any evidence as to what the deceased said about the two notes. Had that evidence been admitted it would have placed beyond doubt our right to recover on both notes, and we ask that it be admitted now, under Rule 232(3). As authority, I refer to *Randall v. Atkinson* (1899), 30 O.R. 620; Holmsted & Langton, Ontario Judicature Act, 4th ed. 1915, at p. 734. The evidence should have been admitted at the trial: *Davidson v. Forbes* (1915), 9 O.W.N. 22, 145, 319.

To prove the notes, we produced them and proved the signature. All the evidence given by the defendant was inadmissible,



as tending to contradict or vary a written document: *Standard Bank of Canada v. Wettlaufer* (1915), 33 O.L.R. 441, 23 D.L.R. 507; *New London Credit Syndicate, Limited v. Neale*, [1898] 2 Q.B. 487 at 491.

We are clearly within the rule in *Crosby v. Prescott*, *supra*. If further facts should have been established, I ask leave to prove them by affidavit now.

*H. F. Parkinson, K.C.*, did not reply.

24th November 1948. Further argument took place, the nature of which is indicated in the reasons for judgment.

*Cur. adv. vult.*

30th November 1948. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment of Mr. Justice Laidlaw and of Mr. Justice Hope in this appeal. I concur with them in the disposition of the appeal.

LAIDLAW J.A.:—The defendant appeals from a judgment of Gale J. dated the 10th June 1948. The action was brought to recover the principal sums of two promissory notes, each note being for the same amount, together with interest thereon, and judgment was given for the plaintiff for the sum of \$8,283.71 with costs. A counterclaim for an account of all moneys contributed and expended in connection with and incidental to the development of a certain mining claim was dismissed without costs. The appellant asks that the judgment be set aside and that judgment be entered dismissing the action with costs and allowing the counterclaim with costs.

It is desirable to refer to the proceedings before and at the trial of the action. The writ of summons was issued on the 2nd September 1930; the statement of claim bears date the 18th May 1931; and the statement of defence and counterclaim the 30th June 1931. There was delay in proceeding thereafter, and the plaintiff died at Schroon Lake in the county of Essex, in the State of New York, on the 28th October 1934, leaving a will, but without naming an executor. Letters of administration with the will annexed were granted in the Surrogate Court of the County of Essex, on the 5th January 1938, to Williamina D. Lunn, widow of the deceased. There was further delay until the 14th December 1946, and on that date a *praecipe* order was issued and provided "that this cause do continue at the suit of Williamina

D. Lunn, widow and sole beneficiary of the said George Wellington Lunn, deceased, as party plaintiff thereto against Samuel W. Barber as party defendant thereto". The plaintiff's reply and defence to counterclaim was not delivered until the 31st October 1947, and I observe that George Wellington Lunn is named as plaintiff therein notwithstanding his death on the 28th October 1934, and notwithstanding the *praecipe* order obtained by the plaintiff on the 14th December 1946.

The defendant applied to the Senior Master for an order to rescind the *praecipe* order of the 14th December 1946, and at the same time the plaintiff applied for leave to amend the style of cause in the said order and all subsequent proceedings by naming the plaintiff therein as administratrix with the will annexed of the plaintiff George Wellington Lunn, deceased. On the 3rd February 1948 an order was made by the Senior Master dismissing the defendant's motion to rescind the *praecipe* order, and it was further ordered "that the above-recited Order to Proceed dated the 14th day of December, 1946, be and the same is hereby varied by providing that this action shall be continued at the suit of Williamina D. Lunn, Administrator with the Will annexed of the said George Wellington Lunn, deceased, and that all subsequent proceedings may be amended accordingly". In his reasons for judgment, noted in [1948] O.W.N. 213 at 214, the learned Senior Master referred to *Crosby v. Prescott*, [1923] S.C.R. 446, [1923] 2 D.L.R. 937, [1923] 2 W.W.R. 569, and, after stating that in his opinion it governed the present case, he said: "... it must be held that Williamina D. Lunn may proceed without taking out ancillary letters of administration in this Province."

It will be convenient to set down at once the decision in *Crosby v. Prescott*, *supra*, as it appears in the judgment of Mignault J. at p. 457. That learned justice, after referring to certain authorities, said: "I think these authorities shew that no grant of letters of administration in the state or country where the debtor is sued is necessary, when the foreign administrator became legal owner and holder of negotiable securities by virtue of his appointment as administrator of the deceased's estate in the state or county where the deceased was domiciled, and when the negotiable securities were in the deceased's possession at his death."

When the present case came to trial, counsel for the plaintiff in opening stated that he intended to put in evidence the letters of administration granted to Williamina D. Lunn. Counsel for the defendant thereupon made his position abundantly plain, namely, his desire to "make the plaintiff produce her evidence as to her right to bring this action". The widow of the deceased was called as a witness. She stated that the late George Wellington Lunn "was a Canadian". It was admitted that no letters of administration, ancillary or otherwise, were granted in Ontario. The examination-in-chief was interrupted by reference of counsel to *Crosby v. Prescott* and to the reasons of the Senior Master, *supra*. After discussion, letters of administration granted in the Surrogate Court of the State of New York to Williamina D. Lunn and exemplification of the will of the late George Wellington Lunn were filed as exhibits. Counsel for the plaintiff then proceeded with the examination of the witness, and I quote a material part thereof as follows:

"MR. FETZER. Q. What is that document? A. Those are the promissory notes.

"HIS LORDSHIP: They look like promissory notes? A. Yes, sir.

"MR. FETZER: Q. Where did you get those notes? A. From Mr. Lunn.

"Q. They were in his effects? A. Yes, they were in his effects."

There was no additional evidence as to the place or places where the effects of the deceased were situate at the time of his death, and in particular there was no evidence that the promissory notes in question were among the effects of the deceased in the county of Essex in the State of New York at the time of his death. Nevertheless, the learned trial judge said in his reasons: " . . . the plaintiff satisfied me as to her capacity to sue."

The appellant set out a number of grounds of appeal, but on the hearing the principal question in controversy was whether Williamina D. Lunn, as administratrix of the estate of the late George Wellington Lunn, has the right to maintain the action. It is certain that the evidence at trial does not show the domicile of the deceased and does not show that the promissory notes were in the deceased's possession at his death. Counsel for the



administratrix asked for leave to file an affidavit to supplement the evidence at trial and to show the plaintiff's right to maintain the action. The Court reserved its judgment on that application until after perusal of the affidavits proposed to be filed on behalf of administratrix. An affidavit dated the 17th September 1948 was thereafter submitted for perusal of the members of the Court. The contents of that affidavit did not establish either of the essentials giving the administratrix the right to maintain the action. In a written memorandum the Chief Justice of Ontario directed the registrar of the Court to call the attention of counsel for the administratrix to that fact, and the memorandum showed explicitly what evidence was necessary to support the right of the administratrix. A second affidavit dated the 24th September, and made by Williamina D. Lunn, was then filed on her behalf. That affidavit likewise does not establish the right of the administratrix. In particular, it does not show that the promissory notes in question were among the effects of the late George Wellington Lunn in the county of Essex in the State of New York at the time of his death.

The Court directed the case to be set down to be spoken to by counsel in respect of the matter of the contents of the affidavits and the filing of them. Counsel for the administratrix asked that they be received by the Court as sufficient proof of the right of the administratrix to maintain the action. He stated that he did not ask for leave to file any further affidavit or in any other way supplement the evidence at trial. Counsel for the appellant objected to the Court receiving the affidavits and argued that in any event they are insufficient to establish the right of the administratrix. He urged that in any event he ought to have full opportunity to cross-examine any witness or witnesses for the plaintiff and to adduce evidence for the defendant in respect of the question in controversy.

During the course of argument as to the place where the promissory notes were situate at the time of the death of the late George Wellington Lunn, counsel for the administratrix, without any enquiry directed to him by the Court, volunteered the information that he himself sent the notes to her. He was then asked when he did so, and, although he could not fix the precise date, he stated that it was after the death of the late George Wellington Lunn. That admission by counsel for the



administratrix concludes the question under consideration. The Court may properly accept the statement and give effect to it. It follows at once that the notes were not in the possession of the deceased at the time of his death and, therefore, on the authority of *Crosby v. Prescott, supra*, the administratrix has no right to maintain the present action. I may add, however, that apart from the admission made by counsel for the administratrix I would not receive the affidavits tendered by counsel for the administratrix. I would refuse to receive them for two reasons:

First, the right of the administratrix to maintain the action was plainly challenged at trial by counsel for the defendant. Counsel knew that he was required to show that the administratrix had the right to maintain the action and came plainly within the conditions set forth in *Crosby v. Prescott, supra*. He must be taken to have deliberately refrained from submitting further evidence at trial in support of the alleged right of the administratrix, and the admission made by him in this court shows of course that such evidence was not available to him.

The second reason for refusing to receive the affidavits is that they do not show the right claimed by the administratrix.

I desire to add that the learned trial judge made no finding as to the whereabouts of the notes at the time of the death of the late George Wellington Lunn nor as to his domicile at the time of his death. He simply said: “. . . the plaintiff satisfied me as to her capacity to sue, and produced the two documents upon which the action is founded.”

It may be that the learned trial judge assumed that all the effects of the deceased, including the notes, were in the possession of the deceased at the time he died. If that assumption was made, it was in error. It may be that the learned trial judge was influenced by the opinion of the Senior Master, but that opinion was not binding in any way upon him or upon this Court. With much respect, the question as to the right of the administratrix to maintain the action was not one for decision by the learned Senior Master.

My conclusion is that the appeal should be allowed with costs and the action dismissed with costs on the ground that the plaintiff has failed to establish a right to maintain the action in this Province. The matter of the counterclaim was not the subject of argument in this court, although in the notice of

appeal the appellant asks in part for an order allowing the counterclaim with costs. In the circumstances, I think there should be no order as to the counterclaim.

HOPE J.A.:—This is an appeal by the defendant from a judgment of Mr. Justice Gale, dated the 10th June 1948, asking that the said judgment be set aside, and that judgment be entered dismissing this action with costs.

The action was commenced by the issue of a writ on the 2nd September 1930, with George Wellington Lunn, now deceased, as the plaintiff, and was for the amount of two promissory notes, each dated the 19th August 1927, and which are conceded to be signed by the defendant. It was further admitted that no payment thereon had been made.

The statement of claim was not delivered until May 1931. The statement of defence was delivered on the 30th June 1931. The plaintiff Lunn died on the 28th October 1934, without having brought the action to trial.

By a *praecipe* order dated the 14th December 1946 Williamina D. Lunn, as the widow and sole beneficiary of the deceased plaintiff, was permitted to continue the action as party plaintiff. The order of revivor was amended by the Senior Master of the Court on the 3rd February 1948, providing that the action should be continued at the suit of Williamina D. Lunn, administratrix with the will annexed of George Wellington Lunn, deceased.

The first ground of appeal argued by counsel for the appellant was that the learned trial judge was in error in holding that the action was properly constituted in the plaintiff, by the order to proceed, notwithstanding the rule of law that an administrator appointed by a foreign Court may not sue in Ontario for debt until letters of administration have been issued by an Ontario Court.

The deceased Lunn, although a Canadian, had for many years been resident in the State of New York. No evidence was submitted as to his domicile. The only evidence at the trial as to the situs of the promissory notes sued upon, as of the date of Lunn's death, was that given by his widow, the present plaintiff. She was asked by her counsel at the trial where she had obtained the notes in question, to which she replied: "From Mr. Lunn." Her counsel then asked the very leading question:

"They were in his effects?" To this the witness replied: "Yes, they were in his effects."

The present plaintiff was appointed administratrix with will annexed of the estate of her deceased husband by the Surrogate Court of the County of Essex, in the State of New York, where the deceased had resided.

In his judgment the learned trial judge stated: "In proof of the claim, the plaintiff satisfied me as to her capacity to sue."

It should be noted that no ancillary letters of administration were applied for or granted to the present plaintiff in the Province of Ontario. Thus the present plaintiff maintains the action as a foreign administrator.

At the initial hearing of this appeal in September, the Court called attention to the necessity for evidence that the deceased George Wellington Lunn was domiciled at the time of his death in the county of Essex, in the State of New York, from which the letters of administration with will annexed were granted, and that the promissory notes were among his effects in the same county at the time of his death, and were found there by the administratrix after his death. Counsel for the respondent sought leave to file an affidavit to meet this requirement. Subsequently two affidavits were so submitted. After considering these the Court was of the opinion that they could not be accepted, but it is of interest to note that while the first of the two affidavits by the respondent makes a categorical statement that the deceased "though a Canadian, never resided in Canada after the year 1895 but always resided in and was domiciled in the United States", it makes no reference to the situs of the promissory notes in question. Both affidavits failed to establish either of the points to which the Court had drawn attention. In fact, the apparent avoidance of any reference to the situs of the notes at the time of the decease of the testator was conspicuous.

On the subsequent hearing of the argument on the 24th November, and on the attention of counsel being drawn to the apparent evasion of the issue in the affidavits, counsel for the respondent stated to the Court that he had himself sent the notes, which had evidently been in his possession, to the administratrix. When asked as to when he had done so, he at first evaded the question, and then declined an answer to it.



Without question, therefore, the only sensible conclusion is that the two promissory notes sued upon were, at the time of the death of the payee, in the possession of the solicitor in Toronto.

In the light of these facts it is abundantly clear that the present plaintiff has not brought herself within the exception in *Crosby v. Prescott*, [1923] S.C.R. 446, [1923] 2 D.L.R. 937, [1923] 2 W.W.R. 569, which so authoritatively establishes the doctrine applicable.

The respondent was not entitled to bring this action in this jurisdiction without first obtaining an ancillary grant in Ontario.

In view of the foregoing it is unnecessary to consider the other grounds of appeal. The appeal is therefore allowed, and the plaintiff's action dismissed with costs here and below. On the appeal counsel for the respondent made no reference to the allowance of the counterclaim, although the same is mentioned in the notice of appeal. In the circumstances I am of opinion that no order should be made with respect thereto.

*Appeal allowed with costs and action dismissed with costs.*

*Solicitor for the plaintiff, respondent: Ernest C. Fetzner, Toronto.*

*Solicitors for the defendant, appellant: Carrick & Weatherhead, Toronto.*

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## [COURT OF APPEAL.]

## Donald v. The Town of Whitby.

*Municipal Corporations—By-laws—Prohibitory and Regulatory Powers—Partial Exercise of Powers—Advertising Signs, Notices, etc.—The Municipal Act, R.S.O. 1937, c. 266, s. 405(54).*

A municipal council has a wide discretion as to the manner and the extent of the exercise of its statutory powers, so long as it does not exceed them, and the terms of clause 54 of s. 405 of The Municipal Act, which empowers a council to pass by-laws "prohibiting or regulating the erection of signs or other advertising devices, and the posting of notices on buildings or vacant lots" plainly indicate that the Legislature intended that the council should have a wide discretion. A by-law purporting to be passed under this clause, therefore, cannot be declared invalid solely on the ground that while it regulates the erection of signs and other advertising devices, it is silent as to the posting of notices. It is not correct in such a case to say that the council must do all that is authorized or leave the matter alone. *Re Rex v. Cullian*, [1937] O.R. 922, overruled; *The Commodore Grill v. The Town of Dunnville*, [1943] O.R. 427, referred to.

AN APPEAL from an order of Barlow J., quashing a by-law.

6th December 1948. The appeal was heard by ROBERTSON C.J.O. and FISHER and AYLESWORTH JJ.A.

W. J. Hare, for the appellant: Barlow J. considered himself bound by the decision of Middleton J.A. in *Re Rex v. Cullian*, [1937] O.R. 922, [1937] 4 D.L.R. 670, and we now ask this Court to overrule that decision, which has never been directly before the Court, although it was criticized in *The Commodore Grill v. The Town of Dunnville*, [1943] O.R. 427, [1943] 4 D.L.R. 183 [THE COURT called on the other side to argue.]

G. W. Mason, K.C. (A. W. S. Greer, K.C., with him), for the respondent: Middleton J.A. did not intend to lay down any general principle in *Re Rex v. Cullian*, *supra*, and the headnote in O.R. is misleading in this respect. It is clear from p. 923 of the report that he intended to deal only with the particular provision before him. The *Cullian* case was distinguished both in the *Commodore Grill* case, *supra*, and in *Re Harper and The City of St. Thomas*, [1939] O.R. 525, [1939] 4 D.L.R. 813, but it has never been adversely commented upon in a case arising under this particular clause.

The wording of s. 405(54) of The Municipal Act, R.S.O. 1937, c. 266, is such that grammatically all the powers are linked together. [ROBERTSON C.J.O.: The section gives powers, rather than restricts. Municipalities must surely be given a wide dis-

cretion in the exercise of their powers. Since clause 54 refers to both "advertising devices" and "notices", it must be assumed that "notices" are something different from advertising.] The intention was to empower a municipality to prohibit or regulate all forms of advertising.

The by-law is also invalid on a wholly different ground, as dealing with the same matters as another by-law (no. 1223), and conflicting with it.

*W. J. Hare*, in reply: There is no conflict or duplication between the two by-laws, and even if there were, s. 300(1) permits the quashing of a by-law only on the ground of illegality, not for duplication.

*Cur. adv. vult.*

17th December 1948. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the municipal corporation from the order of Barlow J., dated 16th September 1948, whereby he quashed By-law no. 1780 of the municipal corporation, being "a By-law to regulate the erection of signs or other advertising devices within the Town of Whitby".

The by-law purports to be passed pursuant to the provisions of clause 54 of s. 405 of The Municipal Act, R.S.O. 1937, c. 266. The statute authorizes the councils of local municipalities to pass by-laws: "for prohibiting or regulating the erection of signs or other advertising devices, and the posting of notices on buildings or vacant lots within any defined area or areas or on land abutting on any defined highway or part of a highway".

Mr. Justice Barlow did not give any reasons in writing for his order, but we were informed that he proceeded upon the authority of the judgment of the late Mr. Justice Middleton in *Re Rex v. Cullian*, [1937] O.R. 922, [1937] 4 D.L.R. 670. A by-law passed on the authority of the same provision of The Municipal Act was in question in that case. Mr. Justice Middleton, in ruling against the validity of the by-law, said:

"I think this present by-law is defective because the municipality is empowered to prohibit or regulate the erection of signs or other advertising devices and the posting of notices, but what the council has undertaken to do is to pass a by-law regulat-



ing the erection of signs and other advertising devices, but saying nothing whatever about the posting of notices.

"I think the municipal powers are limited by the precise words of the legislative enactment, and the municipality must do all that is authorized by The Municipal Act or leave the subject alone."

The by-law in the present case, like the by-law in the *Cullian* case, purports to regulate the erection of signs and other advertising devices, but says nothing about the posting of notices, and counsel for the respondent relies upon the *Cullian* case as a decision directly in point.

This Court, differently constituted, had occasion to consider the decision in the *Cullian* case in the case of *The Commodore Grill v. The Town of Dunnville*, [1943] O.R. 427, [1943] 4 D.L.R. 183. That case arose in respect of a by-law passed under a different section of The Municipal Act, and it was unnecessary for the disposition of that case to form any concluded opinion upon the proper construction of the subsection under discussion in the *Cullian* case, although some dissent was expressed from certain dicta in the *Cullian* case.

We are confronted now with the very question that was decided by Mr. Justice Middleton in the *Cullian* case. We have to determine whether the present by-law is defective, because the council undertook to pass a by-law under s. 405(54) regulating the erection of signs and other advertising devices, but said nothing whatever in the by-law about the posting of notices.

The jurisdiction of a municipal council to pass by-laws under s. 405 of The Municipal Act is a jurisdiction delegated to it by the Provincial Legislature, which has a broad and general jurisdiction to make laws in relation to municipal institutions in the Province, under s. 92(8) of The British North America Act. A municipal council has the jurisdiction delegated to it by the Legislature, and no other. The common complaint in attacks upon municipal by-laws is that the council has exceeded its jurisdiction. The complaint here is that the council did not exercise in full the jurisdiction conferred upon it. The complaint is not that the council has put anything in the by-law that it had no power to enact; the complaint is that the council should have proceeded in the same by-law to deal with the posting of notices, or, as expressed by Mr. Justice Middleton in the *Cullian* case, the

municipal council must do all that is authorized by The Municipal Act, or leave the subject alone.

In the *Commodore Grill* case we expressed our dissent from the dictum of Middleton J.A. in the *Cullian* case, as stating any principle of general application to the powers given to municipal councils under The Municipal Act, but conceded the possibility that there might be some special instance to be found in the statute where, for some exceptional reason, the power delegated by the Legislature could be exercised only in the restricted manner indicated by Middleton J.A. We withheld the expression of any opinion upon the matter he dealt with in the *Cullian* case, until we had heard argument upon it.

In my opinion a municipal council has generally a wide discretion as to the manner and the extent of the exercise of its statutory powers, so long as it does not exceed them. I am further of the opinion that the terms in which s. 405(54) of The Municipal Act is expressed plainly indicate that it was the intention of the Legislature that the council should have a wide discretion in the exercise of the powers that it confers, and that it cannot be said that, in passing a by-law under its authority, a municipality must do all that is authorized by The Municipal Act, or leave the subject alone. The opening words of clause 54 so indicate. By-laws may be passed for prohibiting or regulating; the council is not to do both, but in the exercise of its discretion in any given case may either prohibit or regulate. No doubt, in the same by-law the council may prohibit some things and may make regulations to govern other things. For example, a by-law may prohibit advertising devices that show a red or a green light near a highway traffic signal, or a large sign that obstructs the view at a dangerous corner. The same by-law may contain regulations that apply to signs or other advertising devices that are not prohibited. Equally within its powers, when prohibiting or regulating where it is deemed necessary, the council may refrain from either prohibiting or regulating signs or advertising devices that, in its judgment, it is not advisable, in the public interest, either to prohibit or to regulate.

If the council were required to exercise its powers to the full or "do all that is authorized by The Municipal Act or leave the subject alone", it would require to exercise its powers of prohibition or regulation in respect of the erection of all signs and other

advertising devices and the posting of all notices on buildings or vacant lots within any defined area or on land abutting on any defined highway or part of a highway, as to which it determined to exercise its powers. The mere fact that it is left to the council to define the area or the highway or portion of a highway to be affected, itself indicates a wide discretion in the council, and not a power restricted to its exercise to its full limit, if exercised at all.

Some support for the attack upon the by-law was sought to be obtained by suggesting possible discrimination by reason of the by-law, in favour of persons who advertised by posting notices, and whose notices are neither prohibited nor regulated. It is impossible to say what character of notices the Legislature had in mind in making the enactment, but this much seems clear, that notices in the nature of advertising were not intended, for "signs and other advertising devices" are already covered by the clause. It is common knowledge that there is much advertising done by signs and advertising devices that, for a variety of reasons, may become objectionable from a public point of view, if it is not controlled by the means that are available to a municipality under s. 405(54). I am not aware that the posting of notices, other than such notices as would come within the description of "signs or other advertising devices", is commonly so objectionable from a public point of view as to make the omission to prohibit or regulate the posting of such notices a ground for imputing some improper motive or unfair conduct to the municipal council. There is nothing on the record in the present case to support anything of that nature affecting the passing of the by-law under attack.

In my opinion the appeal should be allowed and the motion to quash the by-law should be dismissed. The municipality should have its costs of both the motion and the appeal.

*Appeal allowed with costs and motion dismissed  
with costs.*

*Solicitor for the applicant, respondent: Arthur W. S. Greer,  
Oshawa.*

*Solicitor for the Town of Whitby, appellant: W. J. Hare,  
Whitby.*

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[McRUER C.J.H.C.]

**Marks v The Imperial Life Assurance Company of Canada.**

*Husband and Wife—Dealings with Third Persons—Credit Extended to Husband on Security of Document Signed by Wife—Document Entrusted to Husband for Signature—Consequences of Misrepresentation by Husband in Obtaining Signature.*

The weight of judicial opinion is that where a person, wishing to extend credit to a husband on the security of a document signed by the wife, prepares that document and entrusts it to the husband for signature by the wife, he cannot escape the consequences of the husband's misrepresentation or duress in securing the wife's signature. *Turnbull & Co. v. Duval*, [1902] A.C. 429; *Chaplin and Co., Limited v. Brammall*, [1908] 1 K.B. 233, and other authorities, considered. The facts, however, must be such that the husband can be viewed as the agent of the prospective creditor for the purpose of obtaining the signature.

*Deeds and Documents—Non est factum—Nature and Application of Plea.*

The basis of the plea of *non est factum* is that an instrument is invalid, not merely on the ground of fraud, but on the ground that the mind of the signer did not accompany his signature—that he never intended to sign, and in contemplation of law never did sign, the document to which his name is appended. *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704; *Thoroughgood's Case* (1582), 2 Co. Rep. 9a, applied. It is clear from the authorities that where a person signing a document is misled by the misrepresentation of another as to its true nature and character, as distinct from the purport and effect of its contents, it is invalid and the plea of *non est factum* will succeed. *Howatson v. Webb*, [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1; *Bagot v. Chapman*, [1907] 2 Ch. 222; *Carlisle and Cumberland Banking Company v. Bragg*, [1911] 1 K.B. 489, and other authorities, applied.

*Insurance—Life—Preferred Beneficiaries—Borrowing on Policy—Wife Signing Borrowing Agreement under Mistake as to Nature of Document—Misrepresentation by Insured—Plea of non est factum—Consideration—The Insurance Act, R.S.O. 1937, c. 256, ss. 132, 144, 151, 153, 156, 163, 165.*

The wife of an insured, named as beneficiary in the policies, signed with the insured a borrowing agreement in respect of each policy. It was found as a fact that the insured misrepresented to his wife the nature of the documents she was signing, telling her that they were merely for the purpose of changing, to her advantage, the scheme of payment of the insurance moneys. A cheque was issued by the insurer for the amount of the loans applied for, payable to the insured and his wife, but it was found as a fact that the purported endorsement of the wife on the cheque was a forgery, and that the wife knew nothing of the issue and deposit of the cheque.

*Held*, the wife was not bound by the borrowing agreements, and was entitled to recover the amount of the policies after the death of the insured, notwithstanding that there had been non-payment of premiums and that the insurer had purported to apply the cash surrender value of the policies to discharge the loans.

The facts as found were not such as to make applicable the principle stated in the first paragraph above. The proper interpretation of them was that the husband applied for a loan and in reply the insurer indicated a willingness to advance money to husband and wife together if they both signed the loan agreement provided for in the policies. There was consequently not the implied agency required for the application of the principle.

The wife was, however, entitled to succeed upon the plea of *non est factum*, since it was clear that the two documents signed by her bore

no relation in class or character to the documents described to her by her husband when she signed them.

The wife was also entitled to succeed upon the ground that no consideration passed to her for the release of her interest in the policies. The effect of the provisions of The Insurance Act respecting preferred beneficiaries is that such a beneficiary has a vested interest in the policy, and that the parties stand in the position of donor of a trust (the insured), trustee (the insurer) and *cestui que trust* (the beneficiary). *National Life Assurance Company of Canada v. McCoubrey*, [1926] S.C.R. 277 at 281; *Re Mutual Life Association; Wellington's Claim* (1909), 18 O.L.R. 411; *Re Lloyd and Ancient Order of United Workmen* (1913), 29 O.L.R. 312, applied. When the negotiations for a loan were initiated the wife had a vested interest in all the benefits flowing from the policies, one of which was that the cash surrender value should be applied until it was exhausted to keep each policy in force. This interest could not be cut down by charging against the cash surrender value the amount of a loan of which the proceeds never reached the wife or her authorized agent.

AN ACTION to recover the amount of two policies of insurance.

26th to 28th May 1948. The action was tried by McRUER C.J.H.C. without a jury at Toronto.

*A. M. Ecclestone*, for the plaintiff.

*W. Judson, K.C.*, and *J. W. Graham*, for the defendant.

22nd December 1948. McRUER C.J.H.C.:—This is an action brought to recover the sum of \$5,000, being the amount of two insurance policies, nos. 305089 and 310550, on the life of the husband of the plaintiff, William John Marks, (hereinafter referred to as "the insured"), placed with the defendant. The policies are for \$2,500 each and are dated the 15th January 1942 and the 29th June 1942. They are made payable to the plaintiff as wife of the insured, if living at the insured's death, otherwise to the insured's executors, administrators and assigns.

The insured was killed on the 20th September 1947, leaving the plaintiff and three small children surviving him. The defence is that the policies had lapsed for non-payment of premiums. It is alleged on behalf of the defendant that the quarterly premium due on the 9th April 1947 on policy no. 305089 was not paid and that the cash surrender value of the policy was at that time \$103.75, against which there was a loan, together with accrued interest, amounting to \$93.21; that the net cash surrender value of the policy was therefore \$10.54, which was sufficient to keep it in force only until the 4th June 1947; that the monthly premium under policy no. 310550 due on the 23rd November 1946 was not paid and that the cash surrender value of the policy was \$81.05 at that time, against which there was a loan which together

with accrued interest amounted to \$76.86; that the net cash surrender value was therefore reduced to \$4.19, which was not sufficient to pay a further monthly premium of \$5 and the policy therefore lapsed at the end of the period of grace from the 23rd November 1946, which was the 23rd December 1946.

In addition to the two policies of insurance here in question, the insured carried two other policies with the defendant, nos. 359617 and 305090, dated the 18th January 1946 and the 25th January 1946 respectively. No question arises in respect of these policies as they had unquestionably lapsed at the date of the death of the insured.

The sole question in this case is whether the alleged loans were made in such a way that they could be applied against the accumulated cash surrender value of the respective policies so as to affect the rights of the plaintiff, who is a preferred beneficiary.

It is contended on behalf of the plaintiff that the borrowing agreement, with which I shall deal in detail, although signed by her, was not signed under such circumstances as would make it binding on her and that a cheque for the proceeds of the loan dated the 9th April 1946, amounting to \$120 and made payable to the order of the insured, William J. Marks, and the plaintiff, although purporting to have been endorsed by the plaintiff, was not in fact endorsed by her.

Before considering the law, it is of prime importance that the finding of fact should be clear. The plaintiff and the insured were married on the 27th December 1940. The insured, following his discharge from the army, worked for some time at Ajax and was planning to take a course at a veterinary college. He told the plaintiff that he had \$10,000 insurance in The Imperial Life Assurance Company and he said that it was so arranged that in case of his death the plaintiff would get \$1,000 down and \$50 a month. He discussed with her several times changing the plan of payment so that she might, in the event of his death, get the \$10,000 in one sum. The plaintiff says that on the occasion when she signed the borrowing agreements (exhibits 1 and 2) her husband told her he was going to have the plan of payment under the policies changed and produced a paper and asked her to get a witness to sign it. She went to an adjacent apartment and asked one Mrs. Morris to come into the kitchen where the deceased had the paper on the table, folded up, and there she signed it and



Mrs. Morris witnessed her signature and that of her husband. The evidence is that the husband had just finished signing his name when Mrs. Morris and the plaintiff came in. The plaintiff says she had no opportunity to read the paper over and that she believed her husband when he told her "he was just going to change the policy", and that if she had known that it was an agreement for a loan on the policies she would not have signed it.

After the death of the insured the plaintiff went to see an agent of the defendant, H. M. Robinson, who told her that there was a loan against the policies. She said that this could not be and he said he would bring the paper and show it to her. Mr. Robinson showed her a photostat copy of the cheque and a copy of the agreement. She says she told him she couldn't understand it and she says that she was at that time in a very confused state of mind as she was suffering from illness which had confined her to bed.

Mrs. Morris, who was on very friendly terms with the insured and the plaintiff, and had attended the plaintiff at the birth of at least one of her children and lived in the same apartment house, says that in or about the month of February Mr. Marks had explained to her that he proposed changing the plan of payment of two insurance policies that he had. This was done in the month of March without any further discussion with the plaintiff or Mrs. Morris. On the occasion of the signing of the documents in question, Mrs. Morris says, the plaintiff came up to her apartment and said: "Would you mind coming and witnessing our signatures on the changing of the policy?" She says that she went down to their apartment and went into the kitchen where Mr. Marks was just signing his name to the paper, which was folded up. He had his arm on the paper and she asked him why he had his arm on the paper and he said: "Well, with this table being enamel the paper is wiggling around." She says that she did not see any writing or printing or other signatures on the paper. The plaintiff signed the paper; at the same time Mr. Marks remarked: "I am in a hurry to get to the office quickly." His only remark about the purpose of the document was: "It is just the change of the policy."

The plaintiff and Mrs. Morris only remember signing one paper but undoubtedly they signed two, which were agreements

for a loan on each of the policies amounting to \$55 in one case and \$65 in the other case.

Mr. Robinson was called as a witness for the defence and he says that after the death of the insured he went to see the plaintiff and took with him photostat copies of the loan agreement and the cheque. His evidence is that he asked the plaintiff if all these were her signatures and she said yes, and he reversed the cheque and said, "take another look at it", and she said, "yes". He says the photostat copies of the front and back of the cheque were clipped together.

L. G. Hardy, the insurance agent employed by the defendant, who wrote the four policies taken out by the plaintiff's husband, stated that he had an application from the insured for a loan. He said he thought it was by telephone. On the 5th April 1946 a representative of the defendant, signing himself as Branch Secretary, wrote to the insured and, after referring to the two policies here in question, said:

"As arranged with Mr. Hardy, we are enclosing loan agreements for \$55.00 and \$65.00 respectively under your above policies. These forms should each be signed by yourself and your wife, using your full names in the presence of witnesses, and returned to us with the two policy contracts for endorsement."

The loan agreements are dated the 5th April 1946, and the cheque for \$120 issued on account of the loan, the 9th April 1946. Mr. Hardy's evidence is that the insured came into his office and picked up the cheque.

On the 20th September 1946 Mr. Hardy wrote to the insured referring to policy no. 359617 and policy no. 310550 as "lapsed", and pointing out that an application for their restoration would be necessary. As I stated, no question arises in this action in respect of policy no. 359617.

On the 18th February 1947 Mr. Hardy again wrote to the insured pointing out that his life insurance affairs were in desperate condition and required immediate attention. On the 24th June he again wrote to the insured stating that he had been trying to get in touch with him many times and that he would like to help him put his life insurance affairs in order.

The cheque for \$120 given on account of the loan is marked "Re Policy Nos. 305089 & 310550". There is nothing on it to indicate that it is an advance by way of loan. It is endorsed

"Willa G. Marks" and "William J. Marks", and was deposited to the credit of a joint account which the plaintiff and the insured had carried in the Bank of Nova Scotia, Gerrard Street and Woodbine Avenue, Toronto, for some years. The deposit was no doubt made by the insured. Some small cheques were subsequently drawn on this account by the plaintiff, but the amounts were not such as to raise any presumption that she knew of the deposit of this cheque to the credit of the account.

The plaintiff denies that she endorsed the cheque in question. The only evidence that she did is that of Mr. Robinson, who had shown her a photostat copy (on a smaller scale) of the cheque, and that of A. B. Farmer, a handwriting expert, who swore that in his opinion the signature of Willa G. Marks appearing on the cheque was written by the same hand as other admitted signatures of the plaintiff. I was not at all impressed with Mr. Farmer's evidence. [His Lordship quoted from the evidence and proceeded:] As pointed out in the cross-examination of Mr. Farmer, there are dissimilarities between the signature "Willa G. Marks" on the cheque and the admitted signatures of the plaintiff. As I have said these were not explained to my satisfaction. I cannot rely on Mr. Farmer's evidence as a sound basis on which to found a judgment; nor am I prepared to accept Mr. Robinson's evidence as proof that the plaintiff endorsed the cheque as against the plaintiff's denial. I therefore accept the evidence of the plaintiff and find as a fact that she did not endorse the cheque in question.

Counsel for the defendant, however, in great fairness, did not seriously rely on the endorsement on the cheque. He contended that the signatures to the loan agreements sufficiently establish that the plaintiff became a borrower from the defendant on the terms set out in the written documents. For the purpose of applying the law to the circumstances I wish first to make it clear that I accept the evidence of the plaintiff and Mrs. Morris as to the circumstances under which the documents were signed. Mrs. Morris is a disinterested party. Observing her demeanour in the witness-box I could see no reason why I should disbelieve her. Although the plaintiff is an interested party, likewise I accept her evidence.

I have come to the conclusion that the unfortunate insured was in a very precarious financial position and that, having regard



to the condition of his wife's health, he was keeping as much from her as possible, and that is what prompted him to secure her signature to the documents in the manner in which he did and to fail to secure her signature to the cheque.

Having found the facts, the plaintiff's rights may be considered in four legal aspects:

1. Whether the provisions of The Insurance Act, R.S.O. 1937, 256, creating a trust in favour of a designated preferred beneficiary, have the effect of placing the insurer and the preferred beneficiary in the relationship of trustee and *cestui que trust*, with the result that in this case an onus was thrown on the defendant, when having dealings with the plaintiff, to see that she signed the loan agreements after full and sufficient deliberation and with all the information which it was material for her to have in order to guide her conduct.

2. The effect of misrepresentation, pressure and concealment of material facts on the validity of a document signed by a wife on the solicitation of her husband, where the party seeking to enforce the document left everything with respect to its execution to the husband.

3. The application of the plea of *non est factum*.

4. The question whether any consideration passed to the plaintiff for the release of her interest in the policies of insurance.

In view of the fact that the first of these aspects was not fully argued before me I refrain from discussing it further than to indicate the distinction between the Ontario statute and the provisions of s. 10 of the English Married Women's Property Act, 1870, c. 93, as amended by the Act of 1882, c. 75, s. 11, whereby the trust is vested in the insured or his nominee and not in the insurer.

The second aspect of the case might to some extent be affected by a full argument on the first. On one view it could not be disassociated from it. I deal with it however, on the basis on which it was argued, and quite apart from any relationship of donor of a trust, trustee and *cestui que trust* that might exist between the parties. This involves a consideration of the question whether it comes within the second branch of the judgment of Lord Lindley in *Turnbull & Co. v. Duval*, [1902] A.C. 429, which was applied in *Chaplin & Co., Limited v. Brammall*, [1908] 1 K.B. 233. At p. 434 Lord Lindley, after setting out the facts, which

showed that one Campbell, who had been instrumental in obtaining the security in question, stood in a fiduciary relationship to the plaintiff who was seeking to set it aside, said:

"In the face of such evidence, their Lordships are of the opinion that it is quite impossible to uphold the security given by Mrs. Duval. It is open to the double objection of having been obtained by a trustee from his *cestui que trust* by pressure through her husband and without independent advice, *and of having been obtained by a husband from his wife by pressure and concealment of material facts*. Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is, in their Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences." (The italics are mine.)

In *Chaplin & Co., Limited v. Brammall*, Vaughan Williams L.J., after quoting from the judgment of Lord Lindley, to which I have just referred, went on to say: "So here the plaintiffs left everything to the defendant's husband; they furnished him with the document that he might get his wife's signature to it, and they must take the consequences of his having obtained it without explaining to her or her understanding what she was signing."

The language used in these cases has given rise to much difficulty in its application. At the time these judgments were written it had not been finally settled by the highest tribunal that the relationship of husband and wife was not such as to give rise to the doctrine of *Huguenin v. Baseley*, (1807), 14 Ves. 273, 33 E.R. 526. This question was finally set at rest by *Bank of Montreal v. Stuart et al.*, [1911] A.C. 120 at 137, C.R. [1911] 1 A.C. 1. This fact, however, cannot be regarded as affecting the decision of Lord Lindley in *Turnbull & Co. v. Duval*, as his judgment appears to have been written on the assumption that the law was as laid down in *Bank of Montreal v. Stuart*. The difficult question is: Was the Judicial Committee of the opinion that

different considerations would have been applicable if the guarantee had been signed by a stranger in place of the wife and under the same circumstances; or, in other words, do these cases decide that a principle of law is applicable to the relationship of husband and wife that is not of general application in the same circumstances?

The judgment of Lord Lindley in *Turnbull & Co. v. Duval* cannot, in my view, be disposed of on the ground solely that Campbell stood in a fiduciary relationship to Mrs. Duval, as has been suggested by some judges, see particularly Perdue J.A. in *Gold Medal Furniture Co. v. Stephenson* (1913), 23 Man.R. 159, 4 W.W.R. 7, 10 D.L.R. 1. Lord Lindley says the security is open to a "double objection". The first objection involved the fiduciary relationship, but there is no suggestion that the second was dependent on the first. What then is the proper application of the last portion of the passage I have quoted?

Vaughan Williams L.J. in *Chaplin & Co., Limited v. Brammall* applies it to a case where the defendant's husband, who was starting in business as a wine merchant, applied to the plaintiff for credit. It was agreed that the plaintiff would give credit if the defendant would sign a guarantee of the account. The plaintiff wrote to the husband advising as to the terms of credit and enclosing a letter of guarantee in order that he might obtain his wife's signature to it. The defendant signed the guarantee. Her evidence was that she signed a paper at home one day; that she was just going out at the time, and that her husband called her back and said he wanted her to sign something; and that she did not read it and it was not read over to her, before she signed it. She further stated that she did not know that what she signed was anything very important, or that it was a guarantee. At p. 237 Vaughan Williams L.J. says:

"Those who, as representing the plaintiffs, prepared and sent to the defendant's husband the document sued upon, in order that he might procure his wife's signature to it, so that the plaintiffs might have security in respect of the business transactions into which they were about to enter with him, were, when they did so, clearly cognizant of the fact that the influence of a husband was being employed to obtain the signature of his wife to that document."



He goes on to point out that the trial judge found as a fact that no sufficient explanation of the document was given to the wife and that she did not understand it, and proceeds to say:

"But the result is that the plaintiffs, who, through their agents, were undoubtedly aware that the execution of this guarantee was to be procured through the guarantor's husband, who was living with his wife at the time, and would presumably have the influence of a husband over her, fail to shew that the document was properly explained to her."

He holds not only that under those circumstances the case falls within *Bischoff's Trustee v. Frank* (1903), 89 L.T. 188, but that it is clearly within the passage of Lord Lindley's judgment to which I have already referred, and he concludes:

"So here the plaintiffs left everything to the defendant's husband; they furnished him with the document that he might get his wife's signature to it, and they must take the consequences of his having obtained it without explaining to her or her understanding what she was signing."

He terminates his judgment with a very important sentence, distinguishing *Bainbridge v. Browne* (1881), 18 Ch. D. 188, on the ground that the persons in that case who had given valuable consideration had not sent or requested the person who obtained the execution of the instrument in question to procure its execution, and were not aware of the influence which that person had over those who executed it, "the case not being one where there was a necessary presumption that such influence existed".

*Chaplin & Co., Limited v. Brammall* was discussed in *Howes v. Bishop et ux.*, [1909] 2 K.B. 390. In applying the judgment in that case it is important to bear in mind the answers to the questions submitted to the jury, and that there was an express finding that there was no duress by the husband, or fraudulent representation or fraudulent concealment of material facts; the plaintiff's solicitors sent a promissory note to the husband to be signed by him and to obtain the signature of his wife; the substance of the transaction was sufficiently explained to the wife; she knew when she signed the promissory note that she was signing a bill or note, and that she was incurring a possible liability for the benefit of the creditor and her husband. The jury further found that the signature of the wife was obtained by the influence of the husband, but they were not agreed that it was

by undue influence. After holding that the doctrine of *Huguenin v. Baseley* did not apply to the relationship of husband and wife, Lord Alverstone referred to *Chaplin & Co., Limited v. Brammall* and distinguished it on the ground that there was a finding that the wife's signature was obtained without sufficiently informing her of, and explaining to her, the contents of the document, and that she did not understand it when she was signing it. He says: "It is obvious that those facts give rise to very different considerations."

Farwell L.J. at p. 402 said: "But in that case [*Chaplin & Co., Limited v. Brammall*] Vaughan Williams L.J. said, with reference to the facts, 'Ridley J. has come to the conclusion that in fact no sufficient explanation of it was given to her, and that she did not understand it.' On those facts that case was a perfectly plain one, and I fail to see why it was reported."

These cases have been the subject of surprisingly little consideration in the English courts. I have been unable to find that *Chaplin & Co., Limited v. Brammall* has been referred to more than once in any English court other than in *Howes v. Bishop et ux., supra*; that is in *Shears and Sons Limited v. Jones* (1922), 129 L.T. 218; and there has been little reference to *Turnbull & Co. v. Duval* except in *Bischoff's Trustee v. Frank, supra*.

Discussion of the relevant English authorities would be incomplete without some reference to the judgment of Vaughan Williams L.J. in *Talbot v. Von Boris et ux.*, [1911] 1 K.B. 854. In that case at p. 862 the learned lord justice said, in dealing with a defence of duress set up by the wife who had signed a promissory note at the instance of her husband:

"I think that the burden of proving that the plaintiff knew or had notice of the duress exercised by the husband rested on the defendant . . ."

The statement of facts in the *Talbot* case showed that there was a clear distinction between them and the facts in *Chaplin & Co., Limited v. Brammall*, in which the same learned judge held that leaving it to the husband to get the guarantee signed was sufficient to attach to the plaintiff responsibility for his acts in procuring its execution. This aspect did not enter into *Talbot v. Von Boris et ux.* At p. 866 Kennedy L.J. says:

"The plaintiff appears never to have been brought into personal communication with either the defendant or her husband

in connection with the transactions which led to the giving of the notes; and, if Ball, who negotiated those transactions on behalf of the defendant's husband, could be treated as being to any extent the agent of the plaintiff in the matter, in which case his knowledge might be attributable to the plaintiff, he too appears on the evidence to have had no knowledge or notice of any duress exercised towards the defendant by her husband."

The effect of these judgments when read with *Chaplin & Co., Limited v. Brammall* seems to make it clear that where the husband applies for a loan and the party supporting the document under attack hands to him an instrument designed to pledge the wife's credit, with instructions to have it signed by the wife for the purpose of completing the transaction with the husband, the plaintiff is affected by any duress exercised by the husband in securing his wife's signature.

Notwithstanding that *Turnbull & Co. v. Duval* and *Chaplin & Co., Limited v. Brammall* have been dealt with in many judgments in the Canadian courts, unfortunately I cannot deduce from these judgments any definite principle on which those two cases are to be applied.

In *Bradley v. Imperial Bank of Canada*, 58 O.L.R. 650, [1926] 3 D.L.R. 38, Smith J.A., at p. 668, considers them in the light that there was a finding of fact in both cases that the husbands were agents of the parties supporting the documents in question and distinguishes the case there under consideration at p. 669: "The bank-manager expressly refused to have the wives advised by the husbands, and refused to accept the document till they were advised by an independent solicitor and until he had the written assurance of the solicitor that he had advised them independently."

Hodgins J.A. stated that he could find no evidence that the husbands were employed by the bank as its agents to get the guarantee signed and does not deal with the argument as to the failure to read over and explain the documents to the wives. Mulock C.J.O., in a judgment dissenting in part, holds that George Bradley misrepresented the document to his wife. Ferguson J.A., in a dissenting judgment of great clarity, at p. 679 holds that there is no abstract proposition of law that a guarantee of a wife obtained by her husband cannot be enforced unless it be made to appear that the contract has been fully explained to her before



she signed it. He then discusses the question: "Should the judgment be supported on the ground that George Bradley, without the knowledge of the bank, misled his wife as to the nature or effect and meaning of the documents, and thus induced her to execute the same under a misapprehension as to either their nature or as to the true purport and effect of the same?" At pp. 679-80 he says:

"I am of opinion that *Bridgman v. Green* (1775), 2 Ves. Sen. 627 [28 E.R. 399], *Turnbull & Co. v. Duval*, *Chaplin & Co. Ltd. v. Brammall*, *Bank of Montreal v. Stuart*, and *Musgrave v. Morton* (1924), 57 N.S.R. 369 [[1924] 2 D.L.R. 1063], are all authorities for the proposition that if a creditor and debtor agree that it is in the interest of both that the debtor's wife shall be induced and persuaded to become surety for the husband's debt, and that the husband shall negotiate with his wife to that end and obtain her signature to a document of guarantee, and that it be left to the husband so to negotiate and to persuade his wife so to contract, and to secure the wife's signature to documents embodying such a contract of suretyship, such debtor and creditor may and should be regarded as co-workers and associated as principal and agent in the negotiating and procuring of the wife's agreement so to contract and the execution of the documents by her, to the extent and end that the contract of guarantee obtained by the husband shall, in the hands of the creditor, be affected by any breach of duty by the husband in procuring the wife's agreement and signature; and, if it be made to appear that the husband procured the contract and document from his wife by undue influence, fraud, duress, misrepresentation, or other breach of duty, the creditor cannot successfully plead, as against the wife, lack of notice of wrong-doing on the part of the husband."

At p. 680 he says: "Yet, I am of opinion that, while the bank and the husband were not, as an abstract proposition of law, under a duty to explain the documents to the wife, if either undertook to explain or represent the nature of the documents, the person undertaking such a duty was bound not to misrepresent."

After the most careful study of this case I have come to the conclusion that there was agreement that there was no onus on the creditor to show that the documents were read over and explained to the wives and that there was no disagreement that if, on the evidence, the plaintiff had left everything with respect

to the signing of the documents to the husbands, it would have been bound by their misrepresentations. I think that the effect of the judgment of the majority is that on the facts the plaintiffs did not leave everything to the husbands with respect to getting the guarantees signed.

*Turnbull & Co. v. Duval* and *Chaplin & Co., Limited v. Brammall*, were considered at great length in *Gold Medal Furniture Co. v. Stephenson*, *supra*. Howell C.J.M. distinguishes them on the facts but does not suggest that they would not have been applied if the facts in the case under consideration justified their application. Perdue J.A. at p. 198 (Man.R.) said:

"I cannot find that the broad statement made in *Chaplin & Co. v. Brammall* that a creditor taking from a debtor a security signed by the wife of the latter is bound to see that she understood the document and had proper independent advice, has been followed in any subsequent case. With deference, it seems to me that if the creditor had no notice of any improper influence on the part of the husband in obtaining the signature of his wife, and in consideration of the document, had given value or changed his position, the wife would be bound by it. A different result might, no doubt, follow if the creditor employed the husband to obtain the security . . ." And he relies on the statement of Vaughan Williams L.J. in *Talbot v. Von Boris et ux.*, *supra*.

Counsel for the defendant argues that *Cox et al. v. Adams* (1904), 35 S.C.R. 393, is authority for the proposition that the plaintiff did not make the husband his agent by merely sending him the "agreement for loan" forms to be signed by himself and his wife, and particularly relies on the following passage from the judgment of Falconbridge C.J.K.B. at the trial, which would appear to be inconsistent with a finding of agency of the nature held to exist in *Chaplin & Co., Limited v. Brammall*:

"It would add new terrors to the conduct of the banking business, if the law were declared to be that if a person indorsing to effect a loan should suggest the name of his wife or daughter as joint maker of a note, or even if the banker intimated that he would discount a note made by the wife or daughter, that the would-be borrower should be hereby constituted the agent of the banker, so as to bind the banker by his statements or his mis-statements."

*Chaplin & Co., Limited v. Brammall* is not discussed in the Supreme Court but I can find nothing in the judgments of the members of the Court that would appear to support the criticism of Falconbridge C.J.K.B. as applied to *Chaplin & Co., Limited v. Brammall*. Girouard J. at p. 398 refers to this passage as a "misconception of the case". The decision in the Supreme Court was based on an application of the doctrine of *Huguenin v. Baseley* to the relationship of husband and wife, and it does not assist in clarifying the point I am discussing. *Cox et al. v. Adams* was reviewed and overruled in *Stuart v. Bank of Montreal, supra*, in which case Moss C.J.O. in the Court of Appeal, 12 O.W.R. 958 at 963, discusses *Turnbull & Co. v. Duval* and *Chaplin & Co., Limited v. Brammall* and treats them as establishing that the husband was an agent for the party upholding the security.

After the most anxious consideration of all the relevant cases I have come to the conclusion that the weight of judicial opinion is that where a person, wishing to extend credit to a husband on the security of a document to be signed by the wife, prepares that document and entrusts it to the husband for signature by the wife he cannot escape the consequences of the husband's misrepresentation or duress exercised by him in securing the wife's signature.

The question remains as to whether on the facts of this case these authorities are applicable. The rights of the plaintiff, the defendant and the insured all arose under a contract which provided:

"At any time while this policy is in force after three full years' premiums have been paid, the Company, in the absence of any legal restriction, will loan on the sole security of this policy, upon the Company's loan agreement form being completed, at a rate of interest not exceeding six per cent. per annum compounded at the end of each policy year, a sum which with any existing indebtedness and interest on the said indebtedness and said sum to the end of the current policy year will not exceed the cash surrender value available in accordance with the table of surrender values."

The element of agency required for the application of *Turnbull & Co. v. Duval* and *Chaplin & Co., Limited v. Brammall* must arise from some implied authority conferred on the husband to act for the defendant in procuring the execution of the documents



signed. The recital in the loan agreement has given me much concern in endeavouring to arrive at a conclusion as to the true relationship between the parties at the time that the money was purported to be advanced. It reads as follows:

"WHEREAS, the Company has this day made a loan to the Borrowers, which loan together with the outstanding Principal in respect of any previous loan or loans (the receipt of which is hereby acknowledged) amounting in all to Fifty-five. . . .xx/100 Dollars upon the security of Policy No. 310550 issued by the Company, and its accumulations, or of any Bond, paid-up Policy or other Policy that may be issued in lieu thereof."

The fact is that at the time the signatures were attached to the documents no loan had been made to the so-called borrowers and none was in fact ever made to them as the cheque for the purported loans never reached the plaintiff. I think the proper interpretation of the facts is that the husband applied for a loan and in reply the defendant indicated a willingness to advance money to the husband and wife upon the loan agreements provided for in the policies being properly signed by them both. I do not think that on these facts the implied agency, required for the application of the cases relied on, exists. I therefore hold that in the absence of any argument developed on the first ground of consideration, with which I have not dealt, they have no application.

In applying the plea of *non est factum* no element of agency is requisite to its support. The basis of it is that the instrument "is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended". That is the *ratio decidendi* of *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704; see p. 711. That case depends for its authority on *Thoroughgood's Case* (1582), 2 Co. Rep. 9a, 76 E.R. 408, a case which has been consistently applied in English jurisprudence for 350 years. In *Foster v. Mackinnon* the action was one brought against the endorser of a promissory note, but for the purposes of the case before me I limit the discussion of the law to its application to deeds and written contracts. It is authority for the proposition that where a person "who for some reason (not implying negli-

gence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force." (p. 711.) This principle is not confined to cases where the signer is blind or illiterate. The extent and limit of its application can best be comprehended by a consideration of three leading English cases: *Howatson v. Webb*, [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1; *Bagot v. Chapman*, [1907] 2 Ch. 222; and *Carlisle and Cumberland Banking Company v. Bragg*, [1911] 1 K.B. 489.

In *Howatson v. Webb* the document in question was upheld but the lines of the application of the plea of *non est factum* were clearly drawn. Warrington J., after referring to the passages I have just quoted from *Foster v. Mackinnon*, interprets them as follows at p. 544:

"I pause there for a moment to remark that it seems to me to be essential to the proposition which is there stated that the contract which the signer means to execute should be of a nature entirely different from the contract in dispute."

He concludes his consideration of the case by explaining the passage from the judgment of Byles J., where he says: "He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument", as follows: "Reading that with reference to the first passage I have quoted I think he means 'deceived as to the actual contents' as expressing the *nature and character* of the document." (The italics are mine).

He goes on: "Then I have had no case cited which carries the plea further than that a misrepresentation as to the nature and character of the document avoids it."

The learned judge considers *Hunter v. Walters*: *Curling v. Walters*; *Darnell v. Hunter* (1871), L.R. 7 Ch. 75; *Kennedy v. Green* (1834), 3 My. & K. 699, 40 E.R. 266, and *National Provincial Bank of England v. Jackson* (1886), 33 Ch. D. 1, and his deduction from these cases is that if an instrument was of a character wholly different from that which it was represented to be it would be void, or, in other words, if the misrepresentation was such as led the signer to believe that he was signing a document of a different character and class, as distinct from

his merely being misinformed as to the effect of its contents, it would be void.

The principle as applied in the judgment of Warrington J. would appear to be clearly outlined in the passage quoted from the judgment of Cotton L.J. in *National Provincial Bank of England v. Jackson*, at p. 10: "Now the rule of law is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void."

In *Bagot v. Chapman*, *supra*, the plaintiffs were seeking to enforce a mortgage for £12,000 signed by a wife at the instance of her husband. The trial judge found that the proper inference from the wife's evidence was: "... that the document she was asked to sign was a document to enable her husband at some future time, if necessity arose, to create some charge upon her reversionary interest; that it was in the nature of what lawyers call a power of attorney . . .; that the document to which her signature was obtained was of a different nature and character from that which she thought she was signing; and that she had no idea that the document was or purported to be an immediate mortgage of her reversionary interest for 12,000*l.*, or that such deed also contained a covenant binding her personally to pay 12,000*l.* . . . she had no intention of executing any document imposing any personal liability upon herself . . . In other words, she was induced by her husband to believe that the document was only an authority to deal in the future with her reversionary interest, but not to subject her to any personal liability."

Swinfen Eady J. at p. 227 says: "It is well settled that where a person is induced to execute a deed by a false representation as to the nature and character of the document he is signing—*where the document is of a totally different character from what he was told it was*—such a deed does not bind him." (The italics are mine).

*Howatson v. Webb*, *supra*, was relied on by counsel as authority for the proposition that a deed must be wholly void and cannot be partly good and partly bad. It is distinguished at p. 228 and



while this point does not arise in the case before me the language used is very applicable:

"In the present case it is quite clear that Mrs. Chapman was never asked to incur any personal liability, and had no intention whatever of doing so, or of authorizing her credit to be pledged in any way, and, even if the charge upon her reversionary interest were valid and binding upon her, I should still hold that her defence of non est factum ought to prevail as regards the covenant in the deed to pay principal and interest."

The same principles are delineated in the judgments of the Court of Appeal in *Carlisle and Cumberland Banking Company v. Bragg, supra*. In that case the defendant signed a document which purported to be a continuing guarantee by him, up to a certain amount, of the payment by R of any sum which might at any time thereafter be or become due from R to the plaintiffs, on the general balance of his banking account with them. In fact the defendant had been induced by the fraud of R to sign the document, without reading it, and not knowing that it was a guarantee but supposing it to be a document of a different character. The jury found that R was not the agent of the plaintiff; that the defendant did not know that the document was a guarantee; that he was induced to sign it by the fraud of R; and that the defendant was negligent in signing the guarantee. It was argued with great force by counsel for the plaintiff that forbearance from reading a document which he signs on the part of a person who could read the document is evidence of negligence which estops that person, as against a person who acted upon the faith of its being valid, from alleging that the contents of the document did not represent his intention. This argument was not permitted to prevail.

Vaughan Williams L.J., after drawing the distinction between a contract and a bill of exchange, at p. 494 states: "... in my opinion, in the case of this instrument, the signature to which was obtained by fraud, and which was not a negotiable instrument, Pickford J. was right in saying that the finding of negligence was immaterial."

Buckley L.J., at p. 495, states this: "I will suppose a case in which he asks a person who brings him a document what its effect is, and he is told untruly that its effect is what it is not, and then signs it. In that state of things in general the document

will not be his deed." After explaining by illustration that it may not be necessary that he know the contents of the deed, the learned lord justice says at p. 496: "If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case, it is not his deed."

Kennedy L.J. at p. 497 states the principle in precise language: "The principle involved, as I understand it, is that a consenting mind is essential to the making of a contract, and that in such a case as this there was really no consensus, because there was no intention to make a contract of the *kind in question*." (The italics are mine).

It would appear to be clear from these authorities that where a person signing a document is misled by the misrepresentation of another as to its true nature and character, as distinct from the purport and effect of its contents, it is invalid and the plea of *non est factum* is a good plea.

In this case the two documents signed by the plaintiff bear no relation in class or character to the documents described to her by her husband when she signed them. The documents he described affected the manner of payment of the insurance moneys on the death of the insured and would have conferred a benefit on the plaintiff in that she would have become entitled to the whole of the insurance moneys instead of receiving them by deferred payments, whereas the documents signed not only created an immediate obligation to repay the loans but reduced the non-forfeiture life of the policies and pledged her vested interest in them as security for the repayment of the loans. On the facts as I have found them and the authorities which I have discussed, these documents must be held to be void.

The fourth aspect of the case is closely associated with the third, but to appreciate it fully one must consider what the plaintiff's rights were when the defendant purported to apply the amount of the loans against the cash surrender value of the policies.

Section 132(1) of The Insurance Act provides that every policy issued shall state the name or sufficient designation of the insured, *and of the beneficiary*, the insurance money payable, the manner of payment, the premium, and the facts which determine the maturity of the contract. Subs. 2 provides that every policy shall indicate the amount (if any) of cash surrender *or loan value*

and the options (if any) of the insured to paid-up or extended insurance respectively provided by the policy.

Section 144 provides that no officer, agent, employee, or servant of the insurer shall to the prejudice of the insured be deemed to be for any purpose whatever the agent of the insured in respect of any question arising out of the contract of insurance.

Under s. 151 the wife is a preferred beneficiary. Section 153 provides that *subject to the provisions of the Act relating to preferred beneficiaries*, the insured may borrow from the insurer upon the security of the contract, receive the surplus or profits for his own benefit and otherwise deal with the contract as may be agreed upon between him and the insurer.

Section 156 is of great importance. Where a member of the class of preferred beneficiaries has been designated in the policy, "a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance money . . . shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured." Then follow certain provisions that are relevant to this case only as indicating the limitations placed on the power of the insured to interfere with or cut down the interest of the named preferred beneficiary.

Under s. 163 the insured may surrender the contract and accept in lieu thereof any paid-up or extended insurance provided by the contract in favour of the preferred beneficiary; or, under subs. 2, he may from time to time borrow from the insurer, on the security of the contract, such sums as may be necessary and *are applied to keep it in force*, and the sums so borrowed shall be a first charge on the contract and the insurance money.

Section 165(1) provides that "Where all the designated preferred beneficiaries are of full age, *they* and the insured may surrender the contract or may assign or dispose of the same either absolutely *or by way of security*, to the insurer, the insured or any other person, but notwithstanding anything herein contained the insured may exercise the borrowing powers conferred by section 163 without the concurrence of any beneficiary." (The italics are mine.) Subs. 3 makes provision for borrowing, etc., for the maintenance of infant children with the approval of the Court.



The precise relation of the parties to this action, at the relevant times, should first be considered apart from the express provisions of the statute.

In *Bliss on Life Insurance*, 2nd ed. 1874, p. 517, it is said: "We apprehend the general rule to be that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created."

This statement, except for the last sentence, is repeated verbatim in the judgment of Fuller C.J. in *Central Bank of Washington v. Hume* (1888), 128 U.S. 195, and was followed by Armour C. J. in *Dolan et al. v. Metropolitan Life Insurance Company et al.* (1894), 26 O.R. 67, where it was held that the beneficial interest in a policy of insurance vested in the preferred beneficiaries as soon as it was issued, and by MacMahon J. in *Bunnell v. Shilling et al.* (1897), 28 O.R. 336 at 345 and 346. See also *Re McGregor* (1909), 18 Man. R. 432, 10 W.L.R. 435.

Authors differ as to whether, apart from the statutory provisions, the statement in *Central Bank of Washington v. Hume* should be accepted as a statement of the law applicable in Canada. Mr. Cameron in his work on *The Law of Life Insurance in Canada*, 1910, p. 123, points out the inconsistency between *Central Bank of Washington v. Hume* and the English law as stated in *Cleaver et al. v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, in so far as it purports to establish that a beneficiary who does not belong to the preferred class has a vested interest in the insurance and he disagrees with Mr. Hodgins who, in his work on *Life Insurance Contracts in Canada*, 1902, p. 51, considered that the American decisions should be followed in Canada. Mr. Sims in his little book on *Life Insurance Contracts in Canada*, 1920, at p. 26, expresses the same view as Mr. Hodgins. This discussion is purely academic in the case at bar except in so far as it forms an introduction to the consideration of the statutory rights of the plaintiff as a preferred beneficiary named in the policies in question.

Where the beneficiary is in the preferred class, the effect of the statute is clearly established in *National Life Assurance Com-*

*pany of Canada v. McCoubrey*, [1926] S.C.R. 277, [1926] 2 D.L.R. 550, per Anglin C.J.C. at p. 281: "Section 28 of the Alberta Statute (s. 139 of the Ontario statute), in expressly creating a trust of the insurance moneys in favour of the beneficiary (or beneficiaries) in the preferred class, not only takes the moneys out of the estate of the insured but makes clear the status of the designated preferred beneficiary to recover the same from the insurer, without intervention of the insured's personal representatives, *as a trust fund in the hands of the insurer of which such beneficiary is the owner in equity.*" (The italics are mine.)

This fiduciary interest in the policy arises the moment the policy comes into force and continues to exist throughout the lifetime of the insured. Falconbridge C.J. in *Re Mutual Life Association; Wellington's Claim* (1909), 18 O.L.R. 411, dealing with the distribution of the assets of an insurance company being wound up under the Dominion Winding-up Act held that the preferred beneficiary had an interest in a policy of insurance during the lifetime of the insured and at p. 414 he said: "The moneys payable in respect of the policy are trust funds, as to which they are beneficiaries, and their nomination as beneficiaries is in effect an assignment of the policy to them, subject to the right of the assured to change the beneficiaries in the cases permitted by the Act, and to their surviving the assured." The moneys were directed to be paid into court to the credit of the infant beneficiaries, subject to such control of the assured as was exercisable by him over a trust fund created by s. 159 of the Ontario Insurance Act.

This case follows *Doull v. Doella* (1905), 10 O.L.R. 411. It is to be observed that the language of Falconbridge C.J. was that the nomination of a preferred beneficiary was in effect an assignment of the policy. This is in no sense to be taken as a statement that it is an actual assignment of the policy. Such a statement would be inconsistent with *Doull v. Doella*, *supra* which the learned Chief Justice followed. In that case Street J. at p. 415 in distinguishing the case before him from certain English cases said:

"If in those cases, therefore, the policy itself instead of only the income derived from the proceeds of it had been settled to the separate use of the wife, the result would have been different.

"In my opinion, there was a valid trust of this policy created by the statute in favour of the wife when it was issued, and

the policy and its proceeds were separate estate within the meaning of the Act, ch. 163 R.S.O. 1897, and were properly seized under the judgment herein."

In *Fisher v. Fisher* (1898), 25 O.A.R. 108 at 110, Burton C.J.O., after referring to the legislation then in effect, stated: "With the wisdom or unwisdom of the change we are not concerned, and I only refer to it for the purpose of shewing that when once a policy was issued in favour of wife or children it became an irrevocable trust, placing it not only beyond the reach of creditors but beyond the control of the husband."

Osler J.A., at p. 118, described the effect of the naming of a preferred beneficiary as follows: "In that case the contract or declaration, by the terms of the Act, creates a trust in favour of the beneficiary according to the intent so expressed or declared. That is what is authorized by the Act and the consequence of it if done."

The result of these cases and of *Re Lloyd and Ancient Order of United Workmen* (1913), 29 O.L.R. 312, 14 D.L.R. 625, is that the dominant idea underlying the provisions of the Ontario Insurance Act which relate to preferred beneficiaries is the creation of a trust which entirely withdraws from the insured any interest in the policy except the reversionary interest he may have on the named beneficiary predeceasing him. The interest of the preferred beneficiary may be divested in three ways only: (1) by the insured designating another preferred beneficiary; (2) by the death of the preferred beneficiary during the lifetime of the insured; (3) by the lapse of the policy.

The law seems to me clear that at the time the insured applied to the defendant for a loan on the security of the two policies in question the position of the three parties was that the insured was the donor of a trust, the defendant was a trustee, and the plaintiff was the *cestui que trust*. This view is reinforced by an examination of the corresponding English statute, s. 11 of The Married Women's Property Act, 1882, c. 75, formerly s. 10 of the Act of 1870, c. 93, which read as follows:

"A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest



so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the County Court of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county, in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid."

In 1882 this section was revised and the following was added:

"The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, *shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid.* If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part."

No provision is to be found in the Ontario statute vesting the policy at the time of its issue in the insured for the benefit of the preferred beneficiary. It seems to me that the effect of the amendment to the English statute in 1882 was to transfer to and vest in the insured or his nominee the obligations which would

otherwise be vested in the insurer and which under our statute remain in the insurer.

It would therefore appear clear that at the time the negotiations for the loan were initiated the plaintiff had a vested interest in all the benefits that flowed from the policies of insurance, and one of those was that the cash surrender value should be applied in each case until it was exhausted, to keep the policy in force. I cannot see how that interest could be cut down by charging against the cash surrender value the amount of a loan the proceeds of which never reached the plaintiff or her authorized agent. There is no suggestion in the evidence that the plaintiff gave any authority to her husband to endorse the cheque on her behalf, nor does the evidence show that she knowingly received the proceeds thereof so as to estop her from denying that the endorsement on the cheque was by her authority. That being so, no consideration passed for the release of her interest in the policies of insurance.

The plaintiff will have judgment for \$5,000, the proceeds of the two policies of insurance in question. The right to interest before judgment was not discussed before me. If the parties cannot agree I will hear counsel further as to whether any order should be made with respect thereto. The plaintiff will have the costs of the action.

*Judgment accordingly.*

*Solicitors for the plaintiff: Shuyler & Ecclestone, Toronto.*

*Solicitors for the defendant: Daly, Thistle, Judson & McTaggart, Toronto.*

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[McRUER C.J.H.C.]

**Re Canada Cement Company Limited and the  
Town of Port Colborne.**

*Municipal Corporations—Amalgamation and Annexation—Validity of By-law Authorizing Application to Municipal Board—Cumulative Proposals—Amalgamation with Other Municipality “as enlarged”—The Municipal Act, R.S.O. 1937, c. 266, s. 23(1), as re-enacted by 1947, c. 69, s. 2.*

The Village of H. passed a by-law providing for an application to the Ontario Municipal Board under s. 23(1) of The Municipal Act, as re-enacted in 1947, for the annexation of certain territory and the amalgamation of H. with the Town of P. Three days later P. passed a by-law for an application for annexation of territory and amalgamation with H. “as enlarged”. On a motion to quash P.’s by-law:

*Held:* (1) It was not a valid objection to the by-law that it provided for both annexation and amalgamation, since there was nothing in the section to prevent both matters being dealt with in one by-law and application.

(2) The provision for amalgamation with H. “as enlarged” was invalid. What was authorized was amalgamation with another municipality then in existence, and not with one which might be entirely different from that contemplated in the by-law.

(3) The two clauses in the by-law were not severable, and it was therefore not possible to uphold the clause as to annexation alone. It was clear that the by-law was considered and adopted as a single scheme, and the annexation and amalgamation could not be regarded as having been considered separately and independently of each other by the council which adopted the by-law. *Nelson v. The City of London*. [1944] O.W.N. 455; *Re Morrison and The City of Kingston*, [1938] O.R. 21, applied.

A MOTION for an order quashing a by-law.

6th December 1948. The motion was heard by McRUER C.J.H.C. in Weekly Court at Toronto.

*H. E. Manning, K.C.*, for the applicant.

*M. A. Seymour, K.C.*, for the respondent.

6th December 1948. McRUER C.J.H.C. (orally):—This is a motion made on behalf of Canada Cement Company Limited to quash By-law no. 356 of the Corporation of the Town of Port Colborne, on three grounds. It is argued, in so far as the by-law provides for amalgamation and annexation in the same enactment, that it does not come within the powers conferred under s. 23(1) of The Municipal Act, R.S.O. 1937, c. 266, as re-enacted by 1947, c. 69, s. 2, inasmuch as the powers given under that section are to be exercised alternatively and not cumulatively. The second and principal ground urged is that the by-law provides for an amalgamation of the Town of Port Colborne with the Village of Humberstone “as enlarged”. I shall deal with the meaning of this



provision in the by-law in due course. The third ground of objection is that the by-law is discriminatory.

I disposed of the last ground on the argument presented by Mr. Manning. It would appear to me that the objections made on this branch of the argument, were in the nature of arguments that should be addressed to the Ontario Municipal Board rather than on an application of this sort. I do not think there is any sound ground put forward that would justify the Court in holding that the by-law is discriminatory.

Section 23(1) referred to provides:

"Upon the application of any municipality authorized by by-law of the council thereof . . . the Municipal Board may by order on such terms as it may deem expedient,—

- "(a) amalgamate the municipality with any other municipality or municipalities;
- "(b) annex the whole or any part or parts of the municipality to any other municipality or municipalities;
- "(c) annex the whole or any part or parts of any other municipality or municipalities to the municipality; or
- "(d) annex the whole or any part or parts of any unorganized township or townships to the municipality,

and any such order may amalgamate or annex a greater or smaller area or areas than the area or areas specified in the application, whether or not the municipality, municipalities, unorganized township or unorganized townships in which the area or areas is or are located is or are specified in the application."

The first contention is based on the wording of clauses *a*, *b*, *c* and *d*, and it is urged by Mr. Manning that a municipal council may authorize an application to the Municipal Board to take either one or other of these courses but that an application to amalgamate and annex may not be made at the same time. I cannot agree with this argument. The statute as drawn gives power to the Municipal Board to make orders upon the application of a municipality authorized by by-law, and I can see no objection to a municipality asking that there be amalgamation and annexation as part of one scheme. Cases were quoted that dealt with a different class of subject, such as prohibition and regulation, and it was urged that in that class of case the municipal council must pass a by-law following the strict wording of the legislation and covering the whole field of the legislation or, in the alternative, if authority is given to do one or the other thing in such cases that must be strictly observed. I do not think

any of the cases that deal with the general principle that the municipality must do all or leave the subject alone have any application to the construction of this section. It is a statute that gives authority to act upon an application properly authorized and I can see no objection to the council authorizing an application which involves both annexation and amalgamation.

Mr. Manning's other objection, however, is more formidable. A municipal council acts only with the authority that is given to it by statute, and its authority is strictly confined to the statute under which it purports to act. This enactment empowers the Municipal Board to make an order on such terms as it may deem expedient to amalgamate a municipality with any other municipality or municipalities. The Board can act only on an application that is authorized by by-law, and the municipal council of the Town of Port Colborne in my view had power only to pass a by-law, no. 509, providing that an application be made to the Colborne with another municipality that was then *in esse*. Applying that construction of the statute to the by-law here in question one must consider the sequence of events.

On the 22nd October 1948 the Village of Humberstone passed a by-law, No. 509, providing that an application be made to the Ontario Municipal Board for an order.

“(a) Annexing that part of the Corporation of the Township of Humberstone described in the Schedule hereto to the Corporation of the Village of Humberstone, and

“(b) Amalgamating the Corporation of the Village of Humberstone as so enlarged with the Corporation of the Town of Port Colborne”.

The area proposed to be annexed to the Village of Humberstone is shown in pink on the coloured sketch attached to the affidavit of Mr. Seymour. This is an area bordering three sides of the Village of Humberstone, the west, north and east.

On the 25th October the Town of Port Colborne passed a by-law which recites By-law no. 509 of the Village of Humberstone; and that it is expedient to apply to the Ontario Municipal Board for an order amalgamating the Corporation of the Village of Humberstone, including the area which the council of the Corporation of the Village of Humberstone is applying, pursuant to By-law no. 509, to have annexed, and annexing to the Corporation of the Town of Port Colborne other parts of the Corporation of the Township of Humberstone. The operative part of the by-law reads as follows:

"NOW THEREFORE THE COUNCIL OF THE CORPORATION OF THE TOWN OF PORT COLBORNE enacts as follows:

"1. That an application to the Ontario Municipal Board for an order

"(a) Amalgamating the Corporation of the Village of Humberstone as enlarged, with the Corporation of the Town of Port Colborne and

"(b) Annexing that part of the Corporation of the Township of Humberstone, described in the schedule hereto, to the Corporation of the Town of Port Colborne be and the same is hereby authorized."

The portion to be annexed to the Town of Port Colborne is shown in green on the sketch attached to Mr. Seymour's affidavit, and lies to the west of the part of the area to be annexed to the Village of Humberstone and west and south of the Town of Port Colborne, and some portion to the east thereof, as well as a small portion to the east of the area to be annexed to the Village of Humberstone.

I cannot find that the statute, strictly read, contemplates giving authority to a municipal council to pass a by-law authorizing an application to the Ontario Municipal Board for an order that the municipality be amalgamated with another municipality "as enlarged". The authority given to the municipal council is authority to pass a by-law authorizing an application for an order amalgamating the municipality with another existing municipality, not a contingent one, which may be as planned by By-law no. 509 or as enlarged or diminished by order of the Municipal Board. Under subs. 1 the Municipal Board on an application for annexation has power to annex a greater or smaller area than is applied for under that by-law. It may very well be that if the Municipal Board decided to annex a very much larger area to the Village of Humberstone those having carriage of the application would decide to go no further with it, but that is not what is contemplated by The Municipal Act. It contemplates that the council shall exercise its judgment with regard to some existing state of facts, and it must be with regard to an existing municipality.

One can see many things that a councillor should take into consideration in making up his mind. He must consider the advantages and disadvantages to be derived from amalgamation and if there is a municipality in existence those disadvantages and advantages are fairly well delineated. If however, there is a contingent municipality in existence the advantages and dis-



advantages are dependent on the Board's order when the matter is finally carried through.

Applying the well-known canons of construction to this particular section of The Municipal Act, I think one must confine the power of the council to the precise wording of the Act, and that is that it had power to authorize an amalgamation of the municipality of the Town of Port Colborne with any other municipality, and would have had power to authorize an application for the amalgamation of the Town of Port Colborne with the Village of Humberstone, but there is no power to authorize an application for the amalgamation of the Town of Port Colborne with the Village of Humberstone "as enlarged", and an attempt to exercise such power is invalid.

I have no hesitation in holding that clause (a) of subs. 1 of By-law no. 356 should be quashed.

The question whether this clause is severable from clause (b) has given me considerable trouble. Taking the section alone, apart from the recitals in the by-law, one would have thought that it was severable, but when it is read with the recitals, and when one considers what the members of the council were actually voting on, it is not so clear that it is severable. What was before the council was a scheme for the enlargement of the Town of Port Colborne, and that scheme involved the amalgamation of the Village of Humberstone and the annexation of a very considerable area around Port Colborne. If I were to hold that clause (a) is severable from clause (b) it would leave the case in the position that the council was authorizing an application for the annexation of certain areas to the east and west that bordered on the area being annexed to the Village of Humberstone. If the Village of Humberstone did not proceed with that annexation it would make communications with this portion of the land being annexed to Port Colborne very difficult.

I can hardly think that these matters were being considered by the council separately and that they were such that they were not dependent upon one another in contemplation of the councillors. The remarks of the late Mr. Justice Gillanders in *Nelson v. The City of London*, [1944] O.W.N. 455, [1944] 3 D.L.R. 604, 82 C.C.C. 73, have some bearing on the consideration of this aspect of the case. At the foot of p. 456 he quotes from the judgment of the late Mr. Justice Middleton in *Re Morrison and The City of Kingston*, [1938] O.R. 21, [1937] 4 D.L.R. 740, 69 C.C.C. 251, as follows: "He further notes in that case: 'The individual councillor may have voted for the by-law with this

qualification and it may be that he, individually, would not vote for the by-law at all unless it was so qualified, and this may have affected the entire municipal council.' ”

I think that principle is applicable to this case. The whole plan seems to have been one that was considered in its entirety and an individual councillor might very well have opposed the annexation of a large area that does not appear to have been laid out in streets or to be in any way developed, if it was not going to be taken in conjunction with the organized area that was included in the Village of Humberstone. ,

I therefore quash the by-law in its entirety. Costs will follow the event.

*By-law quashed.*

*Solicitors for the applicant: Zimmerman, Blackwell & Haywood, Toronto.*

*Solicitors for the respondent: Seymour and Lampard, St. Catharines.*

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[GALE J.]

### Booth v. Booth and Cook.

*Evidence—Privilege—Questions Tending to Show Commission of Adultery—Limits of Protection—Counterclaim for Custody in Action for Divorce—The Evidence Act, R.S.O. 1937, c. 119, s. 7.*

*Divorce and Matrimonial Causes—Special Rules of Evidence—Questions as to Adultery — Statutory Privilege — Limits — Counterclaim for Custody in Action for Divorce—The Evidence Act, R.S.O. 1937, c. 119, s. 7.*

Section 7 of the Ontario Evidence Act is inapplicable where the defendant wife, in an action for divorce, counterclaims for custody of the children of the marriage, and gives evidence on that issue. The wife, in such circumstances, may be cross-examined about her alleged improper relations with her co-defendant, notwithstanding the fact that her counsel has asked her no questions, and she has not volunteered any information, as to the adultery alleged in the statement of claim. The counterclaim is not a “proceeding instituted in consequence of adultery” within the contemplation of s. 7.

*Semble*, such cross-examination would be permissible, on the issue of custody, even if there were no counterclaim, and the issue arose only as incidental to an action for divorce.

A RULING, in the course of a trial, as to the permissibility of proposed cross-examination.

20th and 21st December 1948. The action was tried by GALE J. without a jury at Whitby.

*R. D. Humphreys, K.C.*, for the plaintiff.

*A. W. S. Greer, K.C.*, for the defendant.

21st December 1948. GALE J. (orally):—The action is one for dissolution of marriage brought by a husband against his wife and a co-defendant. In the statement of claim there are contained the usual allegations required by present Rule 774 and it concludes with a prayer asking for dissolution, custody of the four children of the marriage and costs. There is no particular or special allegation in the statement of claim that the wife, who has had possession of the children for several years, is not a fit and proper person or that the plaintiff has special qualifications for rearing his children.

The defendant spouse has delivered a statement of defence in which she does not admit or deny the commission of adultery but in which she seeks to set up a case for custody of the children being awarded to her. There is also a counterclaim which I shall mention later.

The plaintiff has tendered evidence which, at this stage at any rate, would indicate that his wife gave birth to an illegitimate child. The defendant wife, now in the witness-box, having been called for the apparent purpose of establishing her right to the children, has not been asked nor has she volunteered any information relating to the misconduct alleged against her. Counsel for the plaintiff now wishes to cross-examine her upon the question of her immoral relations with the co-defendant, on the ground that such cross-examination is directed to the custody issue for the purpose of inquiring whether the illegitimate child was born as the result of an isolated occurrence or whether the wife and the corespondent have been living together in such circumstances as to induce the Court to come to the conclusion that the children should be entrusted to her. Counsel for the defendant wife takes the position that by reason of s. 7 of The Evidence Act, R.S.O. 1937, c. 119, his client cannot be subjected to cross-examination concerning adultery unless she consents to have such questions put to her and to answer them.

Quite apart from the rights and obligations which flow from the counterclaim, I am inclined to think that even where the question of custody arises only in a divorce action, the defendant spouse is not permitted the protection of s. 7 where his or her testimony is tendered in support of a contention that the witness should have custody of the children. Two fundamental concepts must be borne in mind. To begin with, it is a first principle that any person who can testify with personal knowledge as to any matter in controversy before the Court, and who might thereby assist the Court in coming to a proper result, should be compelled



to give that evidence, and any attempt to detract from that obligation should be carefully scrutinized. While s. 7 of The Evidence Act is an obvious exception to that general rule, in my opinion it should be applied with great care.

The other principle which appeals to me as being of even greater importance is that upon any proceeding the result of which will determine the custody of children, the Court should be fully apprised of all the facts pertaining to the past and future welfare of those children. It is a startling proposition that in a divorce action a guilty wife who gives evidence to further her claim to retain possession of the children cannot be questioned or cross-examined about her mode of living or her immoral relations with a man who is not her husband unless she consents to allow the questions to be put to her.

It is difficult to believe that at any time and in any circumstances the determination as to who shall have the custody of the children of the marriage can be said to be a "proceeding instituted in consequence of adultery" within the meaning of the statute. The proceedings may have been instituted because adultery is suspected of one or other of the two spouses, but the question of the custody of their children is not a proceeding which comes within the ambit of s. 7. On that issue the rights of those who are not parties to the proceedings have to be determined and I cannot accept the suggestion, which would follow if the argument presented on behalf of the defendant wife were to prevail, that the lives of the four children concerned have to be charted with the Court in the dark upon a most essential and almost governing circumstance. It is impossible to believe that where the rights of children are thus involved the hands of the Court should be tied by that section of the Act simply because the contest as to custody is incidental to the divorce action. On the contrary, the fullest possible investigation should be made and the Court should have the best information available before attempting to come to a conclusion which may so vitally affect the welfare of children who are not otherwise concerned with the combat between their parents.

It is suggested that there are unreported rulings to the effect that where a custody issue arises in divorce proceedings either parent may resort to the protection afforded by s. 7 of the Act even though their testimony is confined to the custody application. All I can say is that I would want to see those rulings and the circumstances in which they were given before feeling bound to follow them.

There were also two decisions in the Master's office referred to as being opposed to the view which I have just expressed. I am bound to say, however, that the decision of the Master in *K. v. H.* [1941] O.W.N. 102, does not seem to me to be in conflict with my opinion. There he simply held that in an action for criminal conversation and other relief "based entirely upon the allegation of adultery" a party who has not tendered evidence in disproof of his adultery may claim the protection offered by The Evidence Act. The learned Master must have been of the opinion that the action with which he was dealing was one founded solely upon the allegation of adultery, in view of his reference to the decision of Chancellor Boyd in *Taylor v. Neil* (1896), 17 P.R. 134 where the learned Chancellor held that in an action for both criminal conversation and alienation of affections the defendant spouse, against whom charges of adultery were made, could be examined on matters of adultery because of the inclusion of the allegation relating to alienation of affections. He distinguished the situation before him from that which was presented in *Mulholland v. Misener* (1895), 17 P.R. 132,, where the claim was limited to damages for criminal conversation. Surely the learned Chancellor's observations as to the obligation of a defendant where the action is "a compound one" are particularly apt to the solution of the problem before me.

In *Martin v. Martin* (1923), 24 O.W.N. 323, the learned Master seems to have decided that in an action for alimony based on adultery and cruelty there is no right of cross-examination of the defendant spouse if such cross-examination might tend to show that he had been guilty of adultery. However, the report does not show whether the cruelty there alleged was something apart from the commission of adultery, and if indeed the cruelty alleged was simply the effect of adultery, then the action was certainly one "instituted in consequence of adultery" within the meaning of the Act.

I repeat, therefore, that while it is unnecessary to decide the precise point in this case, I am inclined to the view that a defendant spouse may not resort to s. 7 of The Evidence Act when giving evidence upon proceedings to determine the custody of the children of the marriage, even though that issue arises in a divorce action.

In this case, however, there does not seem to be any doubt about the matter. In addition to her defence, the defendant wife counterclaimed for custody of the children and in that counterclaim she alleged not only that the husband was not a fit and

proper person to bring up his children, but that she, the defendant, was such a person. She has offered herself as a witness upon that issue and accordingly must submit to cross-examination. It can scarcely be argued that the counterclaim is a "proceeding instituted in consequence of adultery". Where a determination of the custody is involved, adultery is only one element to be considered. Here the action for divorce might be dismissed and yet the question as to who is entitled to custody of the children would have to be decided. Those two issues are not so completely intermingled as to induce me to think that the custody issue is based upon an allegation of adultery. True, it might have been initiated when adultery was discovered; that may have been the act which caused the plaintiff to commence proceedings for dissolution and custody. But once commenced, the proceedings relating to custody are distinct proceedings, and are not taken "in consequence of adultery" within the contemplation of s. 7.

While there is a distinction in the wording of the present English Act and our Act, the English authorities are of some assistance on the point. I refer particularly to *Evans v. Evans and Blyth*, [1904] P. 274, 378. Unfortunately I have not had an opportunity of reading the report in *Evans v. Evans and Blyth* as I was unable to locate the volume containing it in the library here, but there is a fairly comprehensive outline of the case in *Elliott v. Albert*, [1934] 1 K.B. 650. In the *Evans* case there had been proceedings for divorce, and adultery had been proved, but a question then arose, on a proposal to vary the settlements, as to whether the child to which the wife had given birth was the legitimate child of the husband and wife or whether it was the child of the wife by the corespondent in the action. The corespondent was put in the witness-box and was asked a question, the answer to which, if given in a certain way, would certainly show that he and the defendant wife had been guilty of adultery. Objection was made that the witness was not bound to answer because the answer would convict him of adultery, but it was held that, the issue in the proceedings then being heard being the determination of the status of the child and not the proof of adultery, the witness should be compelled to answer the question. Likewise in *Elliott v. Albert*, *supra*, which was an action by the plaintiff against a married woman for wrongfully enticing away the plaintiff's husband, the defendant was obliged to answer questions relating to immorality on her part. The Court of Appeal in the *Elliott* case held that as the cause of the action was not based on adultery and the object of the action was not to prove adultery,



and the interrogatories which were sought to be administered were not addressed directly or indirectly to the sole proof of adultery but were intended to show the means by which the desertion of the plaintiff by her husband was procured and to prove the trespass to a house in which the plaintiff was living by permission of her husband, the interrogatories were admissible and the defendant was bound to answer them.

It appears to me that those decisions, along with the opinion of the Court in *Sneyd v. Sneyd and Burgess* (1925), 42 T.L.R. 106, indicate that where the question of adultery is not the sole charge or matter sought to be proved, s. 7 does not apply.

The witness must, therefore, submit to full cross-examination.

*Ruling accordingly.*

*Solicitor for the plaintiff: R. D. Humphreys, Oshawa.*

*Solicitor for the defendant: A. W. S. Greer, Oshawa.*

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[COURT OF APPEAL.]

Newell v. Barker and Bruce.

*Labour Law—Liability of Trade-union Officials Inducing or Attempting to Induce Breach of Contract—Terms of Contract—Employment of Union Workmen Exclusively—Whether Breach Induced by Officials—Justification.*

The cases establish that interference with contractual relations recognized by law is a wrong, and that an action lies for damages suffered by reason of such interference unless there is sufficient justification for it. There must, however, be real interference by a person not a party to the contract, and there is no liability where the contractual relations are terminated by agreement between the contracting parties themselves, owing to the inability of one of the parties to carry out an essential term of the the contract.

A building was about to be erected by C. Co., as principal contractor, under an arrangement with the owner's general contractor. The plaintiff tendered to C. Co. for some of the plumbing work on this building, and his tender was orally accepted. The officers of the two companies later learned from the defendants, who were officials of a trade-union, that the plaintiff employed non-union workmen, and the officers thereupon advised the plaintiff that he must employ union men only, to which the plaintiff agreed. The plaintiff sought unsuccessfully to make some arrangement with the defendants, and C. Co. thereupon advised him by letter that it was "unable to enter into the contract we have been negotiating". The plaintiff signed an acceptance of this notice and a release of C. Co. for any damages "suffered by reason of your being unable to enter into such contract". He based the present action upon alleged wrongful acts of the defendants in procuring C. Co. to break its contract with him.

*Held*, the action must fail. It was properly held that there was a contract between the plaintiff and C. Co., but it should be further held that it was a term of that contract that the plaintiff should employ only union men, and it was because of his inability to perform his own obligation in this respect that the contract was terminated.

*Per* HENDERSON and LAIDLAW J.A.:—The case was not one where the rights of either party to the performance of the contract had been interfered with by the defendants, but was simply one where contractual rights had been terminated by agreement of the parties. The fact that the defendants were admittedly opposed to permitting the plaintiff's employees to join the union was immaterial, since the defendants were not entitled to decide who should or should not be admitted to membership, and no application had been made to the local executive, which alone had that power of decision. It was idle to speculate as to what would have happened had such an application been made.

*Per* HOGG J.A.:—Assuming that the defendants' acts procured a breach of contract causing damage to the plaintiff, nevertheless the plaintiff agreed to that breach by C. Co., although he did not approve of the defendants' acts, and he consequently could not recover from them. Had the plaintiff not agreed to the termination of the contract a quite different situation would have been presented for consideration.

AN APPEAL by the plaintiff from the judgment of Smily J., [1948] O.W.N. 625, [1948] 4 D.L.R. 64, dismissing the action.

6th and 7th December 1948. The appeal was heard by HENDERSON, LAIDLAW and HOGG JJ.A.

*G. T. Walsh, K.C.* (*T. Delany, K.C.*, with him), for the plaintiff, appellant: The trial judge found that we had a contract with the Cooper company for this job, and the defendants, knowing of this contract, took active steps to bring about a breach of it by the Cooper company. They told the Cooper company that they could not supply men if our subcontract remained in force, and this immediately brought about the cancellation of our contract by the Cooper company. The defendants come clearly within the principles laid down in *Klein v. Jenoves and Varley*, [1932] O.R. 504, [1932] 3 D.L.R. 571; *Jasperson v. Dominion Tobacco Company*, [1923] A.C. 709, [1923] 3 D.L.R. 714; *Sorrell v. Smith et al.*, [1925] A.C. 700; *Quinn v. Leathem*, [1901] A.C. 495; *Crofter Hand Woven Harris Tweed Company, Limited et al. v. Veitch et al.*, [1942] A.C. 435, [1942] 1 All E.R. 142; *Camden Nominees, Limited v. Forcey et al.*, [1940] Ch. 352, [1940] 2 All E.R. 1; *Bowen v. Hall et al.* (1881), 6 Q.B.D. 333.

*A. W. Roebuck, K.C.* (*D. Walkinshaw*, with him), for the defendants, respondents: The plaintiff would never have been awarded this subcontract if the head-contractor had known that he operated a non-union shop. No contract had as yet been made,

since the plaintiff and the Cooper company had not yet agreed upon all the terms. The head-contractor's officials asked the defendants to get men for them, but the defendants knew that their men would not work with non-union men employed by the plaintiff. They were under a duty to disclose this fact to the head-contractor, and that is all they did. They did not bring about a breach of the contract, if there ever was a contract. Neither did the defendants refuse to allow the plaintiff to make an agreement with the Local of the union. The head-contractor was under a contractual obligation to the union to use only union workmen. This case is governed by *Hay v. Local Union No. 25 Ontario Bricklayers and Masons International Union*, 63 O.L.R. 418, [1929] 2 D.L.R. 336. The mere communication of a fact is not actionable: *Allen v. Flood and Taylor*, [1898] A.C. 1; *Bulcock v. St. Anne's Master Builders' Federation et al.* (1902), 19 T.L.R. 27.

*G. T. Walsh, K.C.*, in reply: There is evidence that the defendants were determined that the plaintiff's men should not be permitted to join the union.

*Cur. adv. vult.*

6th January 1949. HENDERSON J.A.:—I have had the privilege of reading the opinions of my brothers Laidlaw and Hogg, and I agree in their conclusions.

LAIDLAW J.A.:—This is an appeal by the plaintiff from a judgment of Smily J., delivered on the 4th June 1948, dismissing with costs an action for damages, for a declaration that the defendants were acting in restraint of trade, and for an injunction restraining the defendants, their servants, agents and workmen from molesting or interfering in any way with the plaintiff in the carrying on of his trade and business as a master plumber and steamfitter and in other respects as particularly set forth in the statement of claim.

The plaintiff is a plumbing, heating and sprinkler contractor, carrying on business in the city of Hamilton. At one time he employed in his business only members of the union The United Association of Journeymen Plumbers and Steamfitters of the United States and Canada (herein called for convenience "the Association"). There is a branch of the Association in Hamilton. It is known as Local 67, and the plaintiff was a member of it for



many years. He was dissatisfied with its policy and with the way in which the representatives or officers conducted its affairs, and he ceased to be a member long before the year 1945. Thereafter he employed non-union plumbers and steamfitters in his business.

Under date 18th October 1945 the plaintiff made a tender to W. H. Cooper Construction Company Limited (herein called for convenience "the Cooper company"), Hamilton, to furnish certain materials and do certain work of plumbing and heating and in connection with the city water supply according to plans and specifications for buildings and works being constructed for Procter & Gamble Company Limited. The general contractors for the whole work of construction were H. K. Ferguson Company Inc. (herein called for convenience "the Ferguson company"), and the Cooper company were subcontractors for the construction of the buildings. The Ferguson company is what is known as a union company and had an agreement with the Association to employ only members of the Association. The Cooper company was also a union company.

The tender made by the plaintiff was accepted orally by Mr. R. W. Cooper, vice-president of the Cooper company, after he received the approval of Mr. A. C. Davis, project manager of the Ferguson company. No written contract was executed by the parties.

The plaintiff ordered certain materials from supply houses and did certain things by way of preparation and commencement of the work to be done by him. Afterwards, Mr. Davis learned that the plaintiff was not a member of the union and employed non-union workmen. He communicated with Mr. Cooper, and Mr. Cooper in turn communicated with the plaintiff. I quote, in part, from the testimony of Mr. Cooper as follows:

"I called Mr. Newell and said to him, 'I want it clearly understood that all men that you put on the Procter & Gamble project must be union men. We want no difficulty. Cooper Company have for years hired nothing but union men, we have nothing but the finest co-operation from the union, and it has to be a union job'. Mr. Newell said, 'All right, I will take care of that.'"

The defendant Barker was the business agent of Local 67. He knew that a subcontract had been made between the Cooper company and the plaintiff, and he was in communication about the matter with the defendant Bruce, who is the official organizer in

Canada of the Association. A meeting of the executive of Local 67 was held on 8th November and the defendants Barker and Bruce attended it. An entry in the diary kept by the defendant Bruce shows under that date: "Had Newell case disposed of." Subsequently the plaintiff met the defendant Barker, and Barker made it plain to the plaintiff that he was opposed to the making of an agreement as proposed by the plaintiff. Mr. Cooper then communicated with Mr. Barker and a meeting was arranged between Messrs. Davis, Cooper, Bruce and Barker.

That meeting was held on 12th November, and the learned trial judge finds that the defendant Bruce said to Mr. Cooper during the meeting: "I can't stop you from carrying on with Mr. Newell's contract at all, but you realize that if Mr. Newell carries on with this work that I cannot give Al Davis all the men he will require for this process piping." The process piping was the big part of the whole work of construction, and it was obvious that if the plaintiff was permitted to proceed with his part of the work using non-union employees, the biggest part of the job would be at a standstill, because union men were the only ones the Ferguson company could employ and they would not work on the same job with non-union men.

Mr. Cooper sought to have the plaintiff's men taken into the union, but was informed by the defendant Bruce that the authorities of Local 67 did not have to accept them "and they decided they would not". Following that meeting, the plaintiff addressed a letter to the "President, Members, Local 67 Journeymen Plumbers & Steam Fitters Union, Hamilton", and stated therein that he had made application to Mr. Barker to make an agreement and that his application was refused. He gave notice that he would "take the necessary action . . . unless this action is withdrawn within four days". The letter was delivered to the defendant Barker, but no favourable result was obtained from it.

On 19th November Mr. Cooper delivered to the plaintiff a letter containing a release following and confirming a verbal notice that the Cooper Company were "unable to enter into the contract we have been negotiating with you". The letter contains at the bottom the following acceptance of the notice and release, which was signed by the plaintiff:

"I hereby accept the above notice and release you from all responsibility or liability or damages which I have suffered or

may sustain by reason of your being unable to enter into such contract.”

The plaintiff in his evidence says: “I signed, because I realized Mr. Cooper had done his best out of the situation, and he was in a very predicament [*sic*] position, the same as myself. If I had not signed I would have gone broke, and if I had stayed on the job the Cooper Construction Company would be in a very difficult position, knowing as I do the union tactics.”

Subsequently the plaintiff cancelled orders placed by him for materials, and the work for which the plaintiff tendered was done by a competitor of the plaintiff.

The plaintiff bases his action, as appears in a memorandum filed on his behalf in this court, on “alleged wrongful acts [of the defendants] in (*inter alia*) procuring in the month of November, 1945, the W. H. Cooper Construction Company Limited of Hamilton, to break their contract with the Plaintiff”.

Counsel for the plaintiff relies on the following authorities: *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749; *Bowen v. Hall et al.* (1881), 6 Q.B.D. 333; *Quinn v. Leathem*, [1901] A.C. 495 at 510; *South Wales Miners' Federation et al. v. Glamorgan Coal Company, Limited et al.*, [1905] A.C. 239 at 244, 250, 253, 254; *Conway v. Wade*, [1909] A.C. 506 at 510, 511; *Larkin et al. v. Long*, [1915] A.C. 814 at 842, 843; *Pratt et al. v. British Medical Association et al.*, [1919] 1 K.B. 244 at 256, 267, 268; *Local Union No. 1562, United Mine Workers of America et al. v. Williams and Rees*, 59 S.C.R. 240 at 254-5, 49 D.L.R. 578, [1919] 3 W.W.R. 828; *Hodges v. Webb*, [1920] 2 Ch. 70; *Jasperson v. Dominion Tobacco Company*, [1923] A.C. 709, [1923] 3 D.L.R. 714; *Sorrell v. Smith et al.*, [1925] A.C. 700; *Hay v. Local Union No. 25 Ontario Bricklayers and Masons International Union*, 63 O.L.R. 418, [1929] 2 D.L.R. 336; *Klein v. Jenoves and Varley*, [1932] O.R. 504 at 509, 510, 514, [1932] 3 D.L.R. 571; *Camden Nominees, Limited v. Forcey et al.*, [1940] Ch. 352 at 355, 364, 365; *Crofter Hand Woven Harris Tweed Company, Limited et al. v. Veitch et al.*, [1942] A.C. 435, [1942] 1 All E.R. 142; *Corbett et al. v. Canadian National Printing Trades Union et al.*, [1943] 2 W.W.R. 401, [1943] 4 D.L.R. 441; *Bents Brewery Co. Ltd. et al. v. Hogan*, [1945] 2 All E.R. 570.

The law as settled or referred to in those cases may be stated as follows: Interference with contractual relations recognized



by law is a wrong, and an action lies for damages suffered by reason thereof unless there is sufficient justification for the interference.

Three questions emerge from this principle, and the answers to them determine the question of liability of a person charged with wrongdoing: (1) Was there a contract between the plaintiff and the Cooper company? (2) If so, did the defendants, or either of them, interfere with the contractual rights of the plaintiff? (3) Did such interference, if any, cause damage to the plaintiff?

If the answers to questions 1 and 2 be in the affirmative, another question arises, namely: Was there sufficient justification for such interference?

The learned trial judge found that there was a contract between the plaintiff and the Cooper company. Counsel for the plaintiff relies on that finding, and while counsel for the defendants contended in this Court that the finding was wrong, he stated frankly that he proposed to support the judgment on stronger grounds. I think it is not necessary to discuss the question at length, and I accept the finding of the learned trial judge as correct. It is important, however, to direct attention to one matter in particular. The acceptance of the tender made by the plaintiff consisted of the oral statements made to him by Mr. Cooper as follows, "The job is yours", and also the fact that the plaintiff proceeded with the work with the knowledge and consent of both Mr. Cooper and Mr. Davis. Before the tender was accepted, neither Mr. Cooper nor Mr. Davis, who approved the making of the subcontract between the Cooper company and the plaintiff, knew that the plaintiff was operating an "open shop", that is, that he employed non-union men. Both the Cooper company and the Ferguson company were union companies, and both Mr. Cooper and Mr. Davis knew that union men would not work on the same job with non-union men. The Ferguson company was bound by contract with the Association to employ only union men. It is certain under such circumstances that a subcontract between the plaintiff and the Cooper company would not have been made, and would not have had the approval of Mr. Davis, if either Mr. Cooper or Mr. Davis had realized that the plaintiff intended to use non-union workmen to perform the subcontract. As soon as they learned the facts, Mr. Cooper communicated with the plaintiff, and in the conversation between

them the plaintiff agreed to the demand made by Mr. Cooper that "it has to be a union job". He said in answer to that demand, according to the evidence of Mr. Cooper: "All right, I will take care of that." That undertaking on the part of the plaintiff became a condition and provision of the contract between the plaintiff and the Cooper company. The plaintiff bound himself to fulfil the condition before he knew whether or not he could do so. Nevertheless, it became a contractual obligation on his part which he was bound to discharge, and his failure to do so would be a breach of the contract.

The second question, namely, whether the defendants or either of them interfered with the contractual rights of the plaintiff, is one of more difficulty. It is important to have a clear understanding of the position and rights of the parties under the contract. In the view I take, as above mentioned, the contract included a condition that the plaintiff would employ union men only, and the Cooper company was within its rights in insisting upon fulfilment of that requirement. I think there was no breach of contract on the part of the Cooper company. The position of the parties was simply that the plaintiff could not discharge the obligation undertaken by him. He could not perform that part of the contract. In the circumstances, the parties agreed to terminate their contractual relations and rescinded the contract. The plaintiff voluntarily agreed to the termination and released the Cooper company from liability and responsibility in respect thereof. The case does not appear to me to be one in which the right of either party to the performance of the contract has been interfered with by the defendants, or either of them. It is simply one in which the contractual rights have been terminated by agreement of the parties.

What is said by counsel for the plaintiff, however, is that the defendants made it impossible for him to make an agreement with Local 67 and for his employees to become members of the union, and thus made it impossible for him to carry out his contract with the Cooper company. It is quite true that both Barker and Bruce were opposed to the employees of the plaintiff joining the union, but neither of the defendants possessed the authority to accept or refuse an application from any workman to join the union. That authority rested solely with the executive

of Local 67, and no application for membership from any of the plaintiff's employees was received by Local 67 or its executive.

Again, neither of the defendants had any authority to enter into an agreement with the plaintiff on behalf of Local 67 or the union, or to refuse to do so. Local 67 did not make such agreements. They had only an agreement with an association called Master Plumbers Association. It does not appear from the evidence that the plaintiff attempted to obtain the benefits of any agreement between the Master Plumbers Association and Local 67. He might or might not have been successful in doing so if he had proceeded in a proper manner. He contented himself with an oral proposal to the defendant Barker. After he knew that both Barker and Bruce were against that proposal and personally refused to entertain it, he directed a letter of complaint to the "President, Members, Local 67".

It is idle to speculate what action might have been taken by Master Plumbers Association if the plaintiff had taken proper steps to obtain the benefits possessed by its members, or what action might have been taken by the executive of Local 67 upon application of the plaintiff's employees to join the union. It is plain to me, however, that the plaintiff's case must fail for want of proof. He has not established that his failure to reach an agreement with Local 67, or to obtain the benefits of any agreement between Local 67 and Master Plumbers Association, was caused by any act of wrongdoing on the part of either of the defendants. He has not established that the omission of his employees to become members of the union was caused by any of the defendants, or either of them. In my opinion, it cannot properly be found that the defendants did anything to interfere with the contractual rights of the plaintiff under his contract with the Cooper company.

In view of my finding, as stated above, it is unnecessary to discuss the question whether interference on the part of the defendants or either of them caused damage to the plaintiff. It is sufficient to say that if the plaintiff suffered any damage, it was caused by his own failure and inability to perform the contract as a "union job" in accordance with his undertaking given to Mr. Cooper. That failure and inability is not attributable to the defendants, and the plaintiff has failed to establish that he



suffered any damage by reason of anything done by either of them.

Finally, if it were necessary for me so to decide, I would reach the conclusion that there was sufficient justification in the circumstances for anything done by the defendants. They were both aware of trouble that had existed in past times between the plaintiff and the union. They were entitled to decide for themselves whether they wanted the plaintiff and his workmen to be associated with the union. They were entitled to express their own attitude to the plaintiff and to Mr. Cooper and Mr. Davis. They were free in a meeting of the members of the executive of Local 67 to consider and discuss the position of the union and its members in relation to the contract made between the plaintiff and the Cooper company. Finally, as found by the learned trial judge, Mr. Bruce stated, and in my opinion properly so, that he could not stop the Cooper company from carrying on with the plaintiff's contract but if the plaintiff carried on this work he could not give the Ferguson company all the men required for process piping. I can find no fault or criticism whatsoever with that attitude on the part of the defendant Bruce as official organizer of the Association in Canada. On the contrary, I think it was a proper one.

My conclusion is that this appeal ought to be dismissed with costs.

HOGG J.A.:—This is an appeal from the judgment of Mr. Justice Smily, dated 4th June 1948, dismissing the action with costs, the trial being held at the non-jury sittings of the Court in the city of Hamilton in May 1948. The cause of action consists of an alleged wrongful act on the part of respondents causing damage to the appellant.

The appellant claims that in November 1945, the respondents procured the W. H. Cooper Construction Company Limited of the city of Hamilton to commit a breach of a contract existing between the appellant and that company, whereby the appellant suffered pecuniary loss. In August 1945, the appellant, who is a plumbing and heating contractor in the above-mentioned city, submitted a tender to the aforesaid Cooper Construction Company for certain work to be done in connection with a large building being erected in Hamilton for the Procter & Gamble Company by the Cooper Construction Company, which latter company had a

contract for the engineering and construction work required in the erection of the said building, from the H. K. Ferguson Company of the city of Cleveland, in Ohio, in the United States of America, which company was the general contractor. The appellant's tender of \$32,460 was accepted verbally by the Cooper company, and the appellant, who states that he was instructed to commence work under his contract as quickly as possible, made arrangements for the supply of materials and performed certain preliminary work in accordance with the contract.

The respondent Herbert Barker was a member and the business agent of Local 67 of the United Association of Journey-men Plumbers and Steamfitters of the United States and Canada, and the other respondent, John W. Bruce, was the official organizer for Canada of the said Association.

When Barker learned that the appellant had been awarded a subcontract in connection with the Procter & Gamble building, and being aware that the appellant's employees were not members of Local 67, he informed the respondent Bruce to this effect. Bruce came to Hamilton, and, according to his testimony, considered that steps should be taken to "dispose of"—as he termed it—the appellant's contract.

Mr. Alvin C. Davis, the construction manager in Hamilton for the H. K. Ferguson Company, had approved of the contract between his subcontractor, the Cooper company, and the appellant, and in evidence said that he had assumed that the appellant employed only union men. When Davis learned from the respondent Bruce that the appellant employed non-union workmen, he told Cooper that non-union men could not be employed on the work, as union men would not work along with non-union men on the same job. Cooper immediately informed the appellant that he would have to put union men only on the work for which he had contracted. Mr. Cooper's testimony on this point, which, in my opinion, is of importance, is as follows:

"I called Mr. Newell and said to him, 'I want it clearly understood that all men that you put on the Procter & Gamble project must be union men. We want no difficulty. Cooper Company have for years hired nothing but union men. We have nothing but the finest co-operation from the union and it has to be a union job.' Newell said, 'All right, I will take care of that', and he said, 'You leave it with me for a few days.' "

The appellant found that he was unable to arrange this matter, and a meeting was held between Davis, Cooper and the two respondents on the 8th October. Mr. Cooper's evidence with respect to this meeting is to the effect that he asked the respondent Bruce to allow the appellant's men to come into the union, but Bruce replied that the union had the right to take only such men as they wished; that the union did not think the appellant's men came up to their qualifications and the appellant's men would not be taken into the union as "they felt that they did not have to take them and decided they would not".

On cross-examination the respondent Bruce admitted he had made a statement to the above effect at the aforesaid meeting and that he had told Mr. Davis that he (Davis) would have to see that members of the union were employed on all of his work, and that such being the case the appellant's contract would be at an end. Bruce said he had interviewed the Adam Clark Company, also in the business of plumbers and steamfitters in Hamilton, and informed that company that the appellant's contract had been disposed of, and asked the Clark company to accept the contract as he would assist them in securing men for the work. The Adam Clark Company had tendered for the plumbing work in question and although offered the work by the Cooper company, the Clark company refused to enter into the contract on account of the difficulty of securing materials and workmen. The respondent Barker was an employee of the Adam Clark Company.

On the 19th November 1945 Mr. Cooper wrote to the appellant as follows:

"We hereby confirm our verbal notice to you that, for reasons beyond our control, we are unable to enter into the contract we have been negotiating with you for all Plumbing, Heating and Ventilating required in the Inedible Finished Products Building at the Procter & Gamble Company Project in this City, in the amount of \$32,460.00".

An endorsement appears at the foot of this letter over the signature of the appellant, as follows:

"I hereby accept the above notice and release you from all responsibility or liability or damages which I have suffered or may sustain by reason of your being unable to enter into such contract."



On the 12th November the appellant had written to the president and members of Local 67, Journeymen Plumbers and Steamfitters Union, as follows:

"I wish to inform you that on Saturday, Nov: 10th, I made application to your business agent, Mr. H. Barker, to sign a Trade Union Agreement. This was refused and today Nov: 12th this refusal was confirmed at a meeting between Mr. Davies representing the Proctor & Gamble Co., Mr. R. Cooper of W. H. Cooper Const: Co. your representatives Mr. Barker and Mr. Bruce.

"This action on the part of your representatives interferes with my Legal Rights and I hereby notify you that unless this action is withdrawn within four days of this date, I will be forced to take the necessary action as provided me under the Statutes."

The appellant said that he was aware of the fact that an application to join the aforesaid union was to be made by the workman or workmen and that an employer could only facilitate his employees so joining. The appellant said that he had instructed his employees to become members of the union, but they had not done so.

There are several questions which would seem to require consideration in connection with the issues presented by this appeal: (1) Was there a contract between the appellant and the Cooper Construction Company? (2) If such contract existed, did it comprise a term or condition that the appellant should employ only union workmen? (3) If such contract existed, did the appellant voluntarily agree to its termination?

The appellant's tender was accepted verbally by Mr. Cooper, manager of the Cooper Construction Company, and the appellant was instructed to get together the necessary materials he would require on the job and to perform whatever preliminary work would be required. The appellant immediately commenced work on the building, and there was part performance by him of the contract. It is apparent from Mr. Cooper's evidence that a formal contract was eventually to be executed, embracing the terms agreed upon between the parties.

I agree with the opinion of the learned trial judge that there did exist a contract between the appellant and the Cooper company which was, at a later time, to be embodied in writing.

I have quoted from the testimony of Mr. Cooper as to his conversation with the appellant immediately after he had heard

from Mr. Davis that the appellant was not employing union men exclusively for the work. In the plainest and most unambiguous language Cooper informed the appellant that the work under the contract had to be performed solely by union workmen. The appellant agreed to this condition in the following words: "All right, I will take care of that."

In my opinion a term or condition that only members of the Plumbers and Steamfitters Association would be employed upon the work undertaken by the appellant on the Procter & Gamble building was made part of the verbal contract between him and the Cooper Construction Company by this agreement on the part of the appellant to the demand made by Cooper. I think it is to be inferred that as the terms of the formal contract to be executed by the parties were subject to the approval of the Procter & Gamble Company engineers, and as such contract had not been executed at the time the appellant was notified by Mr. Cooper that he must employ only union men, the contract, when drawn and presented to the appellant for execution, would contain the aforesaid condition. The second question, in my view, must therefore be answered in the affirmative.

Prior to the alleged acts on the part of the respondents to compel, or to procure, a breach of the contract between the appellant and the Cooper company, it is my opinion that the appellant had agreed with Mr. Cooper, as is shown by the evidence which I have quoted, that the contract would be terminated unless the appellant employed union men on the Procter & Gamble building. Later, when efforts to arrange matters with the respondents, so as to enable the appellant to carry on under his contract, had failed, the letter which I have quoted from the Cooper company to the appellant confirmed the verbal notice that the contract must end unless the appellant employed only union workmen in carrying out the work in question. The appellant accepted this notice and released the Cooper company from all liability. It is true that earlier, on the 12th November, the appellant had written the letter which I have quoted to Local 67, but this letter does not directly refer to the contract in question, although I think it was the effect upon the contract of the refusal of the union to help the appellant to carry it on with union men, that the letter contemplates.

The assurance given by the appellant to Cooper, after being informed by Cooper that union men only must be employed on the

work, together with the appellant's statement in writing that he accepted a termination of the contract, in my opinion, prevent the appellant from subsequently contending that the respondents were liable for whatever damage he had suffered because they had procured a breach of the aforesaid contract. I think, therefore, the third question is to be answered in the affirmative.

If the appellant had told Mr. Cooper that he would not agree to the contract being terminated and that, in his view, Cooper was committing a breach of the contract at the instigation of the respondents, a quite different situation would have been presented for consideration. But the appellant, no doubt for reasons that seemed of weight and proper to him, did not take this position, and when Mr. Cooper told him the contract must be terminated the appellant agreed to such action on the part of the Cooper company. My view of the matter is that, if it be assumed that the acts done by the respondents procured a breach of the contract causing damage to the appellant, nevertheless the appellant agreed to such breach by the Cooper company, although he did not approve of the respondents' acts and considered they were responsible for the action taken by the said company.

An examination into the question whether the respondents had sufficient justification in—as Mr. Bruce several times expressed it—“disposing of” the appellant's contract with the Cooper Construction Company, which in my interpretation of the phrase means arranging for the termination of the contract, is not required because of the ground upon which I have concluded the appeal should be determined. Upon this subject the law has been discussed in several cases in the House of Lords, which were cited in the course of the argument in the present appeal. *Sorrell v. Smith et al.*, [1925] A.C. 700, is often referred to as a leading case, but, as Viscount Cave L.C. pointed out, that appeal was not in a case where the defendants procured a breach of contract, as was the issue in a number of decisions which he cited, among them being *Larkin et al. v. Long*, [1915] A.C. 814. In that appeal, Lord Atkinson discussed the law applicable where a breach of contract is alleged to have been procured. In our own court, there is the case of *Klein v. Jenoves and Varley*, [1932] O.R. 504, [1932] 3 D.L.R. 571, in which Mr. Justice Riddell and Mr. Justice Masten state what they consider the law to be.

Lord Sumner's words in *Sorrell v. Smith et al.*, *supra*, are not to be forgotten: “No ‘guidance’ is more misleading, no ‘kindly light’ is more of a will-o'-the-wisp than an obiter dictum some-



times contrives to be, a consideration which the cases cited in the course of this discussion have only too plentifully illustrated."

For the reasons I have given, I think the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Morris and Morris, Hamilton.*

*Solicitors for the defendants, respondents: Roebuck, Bagwell, McFarlane & Walkinshaw, Toronto.*

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[COURT OF APPEAL.]

**Rex v. Linton.**

*Criminal Law—Murder and Manslaughter—Provocation—Charge to Jury—No Necessity for Showing Reasonable Relationship between Provocation and Mode of Resentment—The Criminal Code, R.S.C. 1927, c. 36, s. 261.*

It is not the law of Canada that before culpable homicide can be reduced from murder to manslaughter on the ground of provocation it must be established that the mode of resentment bears a reasonable relationship to the provocation. If the jury find provocation, as defined in s. 261 of The Criminal Code, and further find, as a matter of fact, that the person provoked was actually deprived of the power of self-control by the provocation, this is sufficient, and there is no additional requirement that the action of the person provoked shall be confined within any limit regulated according to the extent of the provocation.

*Criminal Law—Murder—Inflicting Bodily Injury Known to be Likely to Cause Death—Proper Charge to Jury—Intent—The Criminal Code, R.S.C. 1927, c. 36, s. 259(b).*

Where, on a trial for murder, the Crown relies on s. 259(b) of The Criminal Code, it is essential that the jury should find as a fact that the accused intended to cause bodily injuries known to him to be likely to cause death, and that he was reckless whether death ensued or not. Even where the evidence is ample to support a finding of all that is necessary to constitute the crime of murder under this subsection, a conviction will be set aside if this issue has not been left to the jury, and if they have been charged in such a way that they may have thought that an intent to inflict bodily harm is in itself sufficient *mens rea* to constitute murder.

AN APPEAL from a conviction for murder, before LeBel J. and a jury.

13th January 1949. The appeal was heard by ROBERTSON C.J.O. and FISHER, HENDERSON, ROACH and HOPE JJ.A. [The argument is noted only on the points dealt with in the reasons for judgment.]

*G. A. Martin, K.C.*, for the accused, appellant: The learned trial judge misdirected the jury in that he instructed them that if

the accused intentionally struck the deceased three times over the head, and if these blows were the cause of death, then the accused was "clearly guilty of murder" unless his acts were justified (as done in self-defence or defence of his dwelling) or extenuated by provocation. To obtain a conviction for murder, the Crown was required to establish either that the accused intended to cause death or that he had the intent prescribed by s. 259(b) of The Criminal Code, R.S.C. 1927, c. 36, *viz.*, that he intended to cause bodily injury known to him to be likely to cause death, and was reckless whether death ensued or not. This direction in effect withdrew the question of intent from the jury, and amounted to a finding by the trial judge that the accused had the necessary intent. This is fatal to the conviction: *Angus v. Clifford*, [1891] 2 Ch. 449 at 471; *Rex v. Steane*, [1947] K.B. 997, [1947] 1 All E.R. 813, 32 Cr. App. R. 61; *People v. Flack et al.* (1891), 26 N.E. 267 at 270; Stephen, *History of Criminal Law*, 1883, vol. 2, p. 111; Holdsworth, *History of English Law*, 3rd ed. 1923, vol. 3, p. 374; 6 *Cambridge Law Journal* (1938), at p. 33; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, 25 Cr. App. R. 72 at 92, 94, 96. As to the effect of the trial judge deciding issues of fact, I refer to *Rex v. West* (1910), 4 Cr. App. R. 179.

The trial judge read s. 259(b) to the jury, but later, in summarizing it, he misled the jury. He asked them whether anyone could strike such blows "without intending to inflict any bodily harm". This is clearly wrong. The accused must have intended to inflict bodily harm which *he knew* to be likely to cause death. The judge's own words are likely to make a more lasting impression than the words of the section previously read to the jury: *Rex v. Harrison*, 61 B.C.R. 181, 84 C.C.C. 78, [1945] 2 W.W.R. 1, [1945] 3 D.L.R. 122.

There was a failure to charge the jury correctly as to the law of self-defence, and defence of the accused's dwelling, under ss. 59, 60, and 61. This was also a misdirection as to provocation, because it entirely failed to impress upon the jury the criminal and outrageous nature of the deceased's acts.

There was in addition substantial misdirection as to provocation in a passage in which the trial judge told the jury that the law was that, for the defence of provocation to succeed, "the mode of resentment must bear a reasonable relationship to the provocation". This is not the law of Canada, although it has been laid down by the House of Lords in *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1, 28 Cr. App. R. 65. Under s. 261, once

it is established that there was a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control, then the accused is entitled to the benefit of that provocation if the jury is satisfied that he did in fact act in the heat of passion induced by that provocation: *Taylor v. The King*, [1947] S.C.R. 462 at 476, 477-8, 480, 89 C.C.C. 209, 3 C.R. 475.

The trial judge also told the jury that if there was time for a reasonable man to "cool off" the defence of provocation failed. This again, although it is laid down in the *Mancini* case, *supra*, is not the law of Canada, since the question is whether the accused acts upon the provocation before there has been time for *his* passion to cool.

*C. P. Hope, K.C.*, for the Attorney-General, respondent: The Court must consider everything said by the trial judge as to intent, and not pick out one isolated sentence. He read them s. 259(b) at least twice, and when the whole of this part of the charge is read together, it must be found that the issue of intent was adequately put to the jury. In the abortive trial in *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, the trial judge (Cave J.), whose charge is quoted at p. 467, said almost exactly the same thing, and his charge was expressly approved in *Mancini v. Director of Public Prosecutions*, *supra*.

The trial judge dealt in careful detail with all the matters that might have constituted provocation, and his instructions as to the necessary relationship between the provocation and the mode of resentment was, I submit, in accordance with the decision in *Taylor v. The King*, *supra*, particularly the judgment of Kerwin J.

*G. A. Martin, K.C.*, in reply: The passage quoted from the charge in the *Woolmington* case bears no resemblance to the passage of which I complain in this case.

*Cur. adv. vult.*

17th January 1949. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant on his trial before Mr. Justice LeBel, with a jury, at Simcoe, on a charge of murder.

The appellant was charged with the murder of one Louis Stewart at the township of Charlotteville, in the county of Norfolk, on the 6th June 1948. There is no dispute that the appellant killed Louis Stewart. There is no dispute that the death of Louis Stewart was caused by a blow or blows on the head, administered by the appellant, the instrument being the stock of a rifle in the



hands of the appellant. The appellant says that he was not properly convicted of murder, by reason of certain errors in the charge of the trial judge to the jury, and it is with these alleged errors that we have to deal.

It was argued for the appellant that there was no premeditation on his part, nor any such intent as it was necessary for the Crown to show, to establish the crime of murder. There had been an attempt by Louis Stewart and another to break into appellant's dwelling a few minutes before Stewart was struck on the head by the appellant with his rifle. The appellant alleged that the blows were struck by him in self-defence, and in defence of his dwelling, and in the course of the trial evidence was given that, in the opinion of the trial judge, made it proper that he should also instruct the jury on the defence of provocation, although that had not been put forward in the address of appellant's counsel to the jury. Before dealing with either of these matters of defence in his charge to the jury the learned trial judge instructed the jury as to the essentials of the crime of murder, and, in particular, read to them clause *b* of s. 259 of The Criminal Code, R.S.C. 1927, c. 36, instructing the jury that culpable homicide is murder "(b) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not". Then, after summarizing to the jury the evidence of Dr. Deadman, who had performed a post-mortem examination of the deceased, which disclosed the cause of death as injuries to the head consistent with damage done by the rifle, the trial judge proceeded as follows:

"Now, if you accept Dr. Deadman's opinion, and there is no evidence to the contrary, and if you accept the accused's admission that he struck the deceased intentionally three times with his rifle, the accused is clearly guilty of murder unless his actions were justifiable in law or unless the law permits you to reduce the crime to manslaughter in all the circumstances."

Objection is taken by counsel for the appellant that this was misdirection in that it, in effect, would lead the jury to believe that an intent to inflict mere bodily harm was a sufficient *mens rea* to constitute murder, unless the act was justified or extenuated. It may well be that the evidence was ample to support a finding by the jury of all that was necessary to constitute the crime of murder, including the intent, but that finding was one to be made by the jury and not by the trial judge. Intent is a question of fact, and not a question of law. In my opinion this direction to the jury was wrong.

The learned trial judge, in dealing with the question of provocation, instructed the jury that: "The law is that the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter". And he put to the jury the question: "Can you find that relationship on the facts of this case?" If there is evidence of provocation, as defined in s. 261 of The Criminal Code, and the jury find provocation, and find, as a matter of fact, that the person provoked was actually deprived of the power of self-control by the provocation, there is no requirement that the consequent action of the person provoked, and who has been deprived of the power of self-control, shall be confined by him within any limit regulated according to the extent of the provocation. What s. 261 of The Criminal Code prescribes is that the act be done in the heat of passion caused by sudden provocation. This direction of the learned trial judge was in error, and was such as might prevent a jury from giving proper effect to the defence of provocation.

A number of other grounds of objection to the charge were relied upon for the appellant, but I do not consider it necessary to discuss them. In my opinion the errors in the charge to which I have particularly referred are grave enough to make a new trial necessary. This is not a case, in my opinion, where the provision of subs. 2 of s. 1014 of The Criminal Code can be applied. An order, therefore, should go setting aside the conviction and directing a new trial.

*New trial ordered.*

*Solicitors for the accused, appellant: Tisdale & Fort, Simcoe.*

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## [COURT OF APPEAL.]

## McLaughlin v. Mitchell et al.

*Joint Tenancy and Tenancy in Common—Whether Conduct of Parties Inconsistent with Joint Tenancy, as provided for in Deed—Circumstances Excluding Survivorship—Right to Rents and Profits — The Limitations Act, R.S.O. 1937, c. 118, s. 31.*

*Mistake—Recovery of Money Paid under Mistake of Fact—Basis of Action—Money Had and Received—Necessity for Showing actual Receipt by or on behalf of Defendant.*

*Limitation of Actions—Declaration of Ownership of Land and Judgment for Rents and Profits—When Cause of Action Arose—Concealed Fraud—The Limitations Act, R.S.O. 1937, c. 118, s. 31.*

The plaintiff and one H bought land together in 1919, each contributing half of the purchase price. The evidence was that H, a much older man and an old friend of the plaintiff, was anxious to help him re-establish himself after war service. During H's lifetime he kept the deed to the property, and he and the plaintiff shared equally in the revenues from it. After H's death the plaintiff continued the same arrangement with the widow, rents being collected by an agent on her behalf and divided with the plaintiff, and the deed remaining in her possession. The widow died, having devised the property to one R, and for a time the same agent continued to collect the rents, paying half the profits to the plaintiff and the other half to R. The plaintiff, desiring to sell his interest, retained a solicitor to search the title and then learned for the first time that the deed had been made to him and H as joint tenants and not as tenants in common. The plaintiff then sued for a declaration that he was the sole owner of the land, and to recover half of the rents and profits from the time of H's death. The defendants in the action were R and the executrices of Mrs. H.

*Held*, the plaintiff was entitled to the declaration of ownership. There was nothing to support the suggestion that there had been a mistake on the part of the solicitor who drew the will, or that H had not understood the incidents of a joint tenancy, and this view was supported by the fact that H had made no attempt to dispose of this property by his will. There was nothing in the conduct of the parties after the giving of the deed which would show that they considered themselves tenants in common rather than joint tenants. *Harrison v. Barton* (1860), 30 L.J.Ch. 213, referred to.

The claim to recover the rents and profits, however, must fail. So far as this claim was concerned, the action was one for money had and received, and in such an action it must be shown that the defendant received the money in question. *The Township of Chatham v. Houston* (1868), 27 U.C.Q.B. 550, applied. None of the executrices had in fact received any of these moneys, and the claim against them must accordingly fail. (No relief was claimed by the plaintiff against R.)

*Per Hogg J.A., dissenting in part*: The plaintiff was entitled to succeed on both branches of his action. As to the claim for his share of the rents and profits, the receipt of these moneys by the agent appointed by the widow, and retained by the executrices after her death, should be deemed to be receipt by the executrices. Whether the executrices might have a claim against R was not in issue in this action.

Judgment of Wells J., [1948] O.R. 330, varied.

AN APPEAL by the defendants, and a cross-appeal by the plaintiff, from the judgment of Wells J., [1948] O.R. 330, [1948]



3 D.L.R. 834. The facts, and the relief sought, are fully stated in the reasons for judgment.

22nd September 1948. The appeal was heard by LAIDLAW, HOGG and AYLESWORTH JJ.A.

*J. J. Robinette, K.C.*, for the defendant Blanche Summers, appellant: For the purposes of my argument I accept the finding that there was a joint tenancy between the plaintiff and Hill, although I do not concede it. The trial judge, in giving judgment against us for the share of the rents and profits, overlooked the fact that the executrices never received any of these moneys, which were paid over by the agents directly to Randall. The action is one for money had and received. It cannot be considered as one against executors for permitting estate moneys to fall into the wrong hands, since the plaintiff's whole case is that these rents were not estate moneys at all. A peculiar circumstance is that although Randall was added as a party defendant, the plaintiff makes no claim against him. Neither Randall nor his mother before him had any right to these moneys, if the existence of a joint tenancy is accepted.

The trial judge has held that the various agents who collected these rents were the agents of Mrs. Hill only, but at the very least it must be held that the plaintiff acquiesced in her choice.

We are concerned only with the six-year period immediately preceding the issue of the writ, since the trial judge has held that the claim for any period earlier than that is barred by The Limitations Act, R.S.O. 1937, c. 118. Mrs. Hill died in 1937, and the executrices would have ceased to have any interest in the property in question after 1940, and during the whole six years the profits were paid directly to the specific devisees. *Royal Bank of Canada et al. v. The King et al.*, [1913] A.C. 283 at 296, 9 D.L.R. 337, 3 W.W.R. 994, 23 W.L.R. 315, is important not only as to the nature of an action for money had and received, but also as to limitation.

The essential foundation of an action for money had and received is that the money was in fact received by the defendant: *The Township of Chatham v. Houston* (1868), 27 U.C.Q.B. 550 at 556.

In the alternative, even if the executrices can be considered to have received the moneys, they paid them over to the Randalls under a mistake of fact, and an action will not lie in such circumstances, on the equitable principle that there can be no recovery against a mere agent: *The Bank of Montreal v. The King* (1907), 38 S.C.R. 258.

*Charles Kappeler*, for the other defendants, appellants: The deed on which the plaintiff's case is based was made as the result of an error in the mind of Hill, for it cannot have been intended by him that there should be a joint tenancy. The fact that he did not mention this property expressly in his will is of no significance, since there were three other properties which he failed to mention, and which passed to his widow under the residuary clause of his will.

I adopt the argument already advanced on other points.

*R. R. McMurtry, K.C.*, for the plaintiff, respondent and cross-appellant: This action should not be considered as a common law action for money had and received, but rather as an equitable one, as indicated in *The Dominion Bank v. The Union Bank of Canada* (1908), 40 S.C.R. 366 at 381. The argument for the appellants is based upon the contention that the executrices dealt with this money as innocent agents, and had no benefit from it. The cases referred to on this point have no application here, because the basis of our claim is that the executrices collected money which belonged to us, and thereby constituted themselves trustees. They assumed, erroneously, that the moneys belonged to the estate, as to one-half of the profits, and directed the agents to pay them to them, and later to the devisees. Having had the deed in their possession, and given this direction to the agents, they are liable. We gave no instructions to the agents except as to one-half the proceeds.

The executrices cannot be considered as "innocent agents" within the cases cited. Whose agents could they be? When we demanded the title deeds and an accounting, they refused both demands, and at no time did they themselves take the position that they were agents. *Royal Bank of Canada et al. v. The King et al.*, *supra*, has no application here. *The Bank of Montreal v. The King*, *supra*, indicates clearly the circumstances in which those cases are applicable, and the facts of this case do not bring it within them.

The trial judge should not have held that s. 31 of The Limitations Act was inapplicable, and should have given us judgment for our share of the rents and profits for the whole period following the death of Hill. Even if there was no actual concealment by the executrices, they must accept the responsibility for the concealment practised by Mrs. Hill, who had the deed in her possession. She was clearly guilty of fraudulent concealment, accepting equity's definition of fraud, as laid down in *Nocton v. Lord Ashburton*, [1914] A.C. 932 at 954. It is sufficient to show that there

has been a violation of an obligation of which the party is assumed to have known.

What we submit in this connection is that Mrs. Hill had the deed in her possession; that this deed clearly showed the existence of a joint tenancy; that she should have notified the plaintiff; and that her failure to do so amounts to fraud within the meaning of s. 31. There is one further fact, overlooked by the trial judge, *viz.*, that Mrs. Hill, having the deed in her possession, made an affidavit referring to this property by lot and plan number, showing that she must have looked at the deed to obtain the particulars. She cannot be excused on the plea that she did not appreciate the meaning of the words creating the tenancy. [LAIDLAW J.A.: The trial judge has found that she did not understand the nature of the tenancy, and that it was not pointed out to her.] That finding is unreasonable, and should be reversed.

Mrs. Hill was a constructive trustee, and a mistake in law does not excuse her. If it cannot be said that possession of the deed implies knowledge, at least it can be said that she recklessly or negligently failed to ascertain something about which she should have informed herself. The whole chain of consequences has arisen from her disregard of her duty. As to constructive trustees generally, see 33 Halsbury, 2nd ed. 1939, p. 89, para. 143, and p. 226, para. 408.

Concealed fraud, within the meaning of s. 31, does not necessarily involve moral turpitude: *In re McCallum; McCallum v. McCallum*, [1901] 1 Ch. 143. The gist of the matter is, first, that there has been a concealment, and secondly, that a person has been deprived thereby of something to which he is rightfully entitled. If these two elements are present, then knowledge must be imputed to the trustee because she concealed something which she should have known. The plaintiff was under no obligation to inquire until there was something to make him suspicious: 13 Halsbury, 2nd ed. 1934, p. 214. Mrs. Hill had the deed, and we were entitled to rely upon what she said. If she was guilty of concealed fraud, the defendants cannot claim the benefit of the statute, because their title comes through her: *In re McCallum*, *supra*.

I have been unable to find any English or Canadian case dealing directly with the legal position of an executor who takes over and administers assets which are not the property of the estate. Some cases are set out in 23 Corpus Juris, 1921, p. 1196.



*D. A. Keith*, for the plaintiff: It is surely obvious that the fact that Hill did not mention this property in his will shows that he realized that his estate would have no interest in it. The plaintiff did nothing for 18 years, it is true, but this was because he had no reason to suspect that the position was other than he had been told. The succession duty affidavits would not put him on his guard, since they showed Hill's half interest in this property as passing to his widow.

It is true that the plaintiff did not know of Hill's actions in connection with the deed, but Hill had complete authority as the plaintiff's agent in that matter, and the plaintiff, having learned the facts, ratified what Hill had done. The fact that each paid half of the purchase price could of course be evidence in support of either conclusion. Hill's motive was his interest in the plaintiff as a younger man, and his pride in the plaintiff's military record. The trial judge's finding that this was not an enterprise by way of trade upon the hazard of profit and loss is clearly justified on the evidence.

*J. J. Robinette, K.C.*, in reply: The respondent has not answered my central argument, which is that the executrices received no moneys during the period in question. The action for money had and received is not an equitable one, and the doctrine of concealed fraud is inapplicable in a common law action. This is not an action for the recovery of land or rent: *Finch v. Gilray* (1888), 16 O.R. 393.

*Charles Kappele*, in reply: Both parties thought that they were tenants in common, and there can therefore be no question of concealed fraud.

*R. R. McMurtry, K.C.*, in reply (as to the cross-appeal): As to s. 31 of The Limitations Act I refer to *Hopkins v. Hopkins et al.* (1883), 3 O.R. 223 at 230.

*Cur. adv. vult.*

20th January 1949. LAIDLAW J.A.:—After a trial before Mr. Justice Wells judgment was reserved and subsequently delivered by him on the 12th March 1948. It was declared that the plaintiff is the sole owner of certain lands and premises known as 154 Cowan Avenue in the city of Toronto, and it was ordered that the plaintiff recover the sum of \$1,037.26, being a one-half portion of the amount of rents and profits of the entire property from the 2nd May 1940, together with interest thereon. The plaintiff was also awarded the costs of the action. The defendants Effie Mitchell, Madeline Latimer and Charles B. Randall appeal to

this Court and ask that judgment should be entered dismissing the action with costs and allowing with costs a counterclaim of the defendant Charles B. Randall for a declaration that he is entitled to an undivided one-half share or interest in the property and for an order that the deed thereof be amended by striking out the words "as joint tenants" and "as joint tenants and not as tenants in common" wherever they appear therein.

The defendant Blanche Summers, represented at trial and in this court by separate counsel, asks that the action be dismissed as against her with costs. She does not appeal against that part of the judgment declaring that the plaintiff is the sole owner of the lands and premises. Counsel appearing on her behalf in this court stated that for the purposes of his argument he accepted the finding of the learned trial judge that there was a joint tenancy of the property, but he did not concede that to be so. Her appeal is brought against that part of the judgment whereby the plaintiff was awarded one-half of the rents and profits of the property and interest thereon, in so far as it imposed liability upon her.

The plaintiff gave "notice of cross-appeal" and asked therein that the judgment of the Court below be varied by awarding to the plaintiff the sum of \$2,967.69, representing one-half of the net rents and profits had and received by the defendants, or someone claiming through them, for the period from the 13th December 1928, and for compound interest thereon at 5 per cent. per annum by way of damages, or in the alternative for an order directing a reference to the Master at Toronto to determine the amount which represents one-half of the rents and profits during the aforesaid period, plus compound interest on the amount found due at 5 per cent. per annum by way of damages.

The material facts are not in dispute. The plaintiff and one Thomas Hill, deceased, were close friends. Thomas Hill was at one time a farmer and lived on a farm adjoining that of the plaintiff's parents. He took a great interest in the plaintiff as a young boy and continued to show much affection for him as he grew to manhood. The plaintiff was on active service during the first great war, and when he returned from overseas in 1919 the late Thomas Hill was living in Toronto. Mr. Hill was then a widower with no dependants. He appears to have treated the plaintiff in many ways as a son and to have been anxious to help him re-establish himself in civil life. He proposed that the plaintiff join him in a transaction to purchase premises at 154 Cowan Avenue, Toronto, and convert it into a "triplex" dwelling for the purpose of rental. At that time, according to the evidence

of the plaintiff, the late Thomas Hill gave the plaintiff to understand that eventually the property would belong to him. The plaintiff contributed one-half the purchase price of the property, including one-half of the amount necessary to pay off an existing mortgage. He also paid one-half the cost of converting the premises into a triplex dwelling. The late Thomas Hill conducted all the business of the transaction, including instructions to a solicitor for the completion of the purchase. The deed was taken in the names of the plaintiff and Thomas Hill as grantees, and the grant to them as appears therein is:

“unto the said grantees in fee simple as joint tenants . . . To HAVE AND TO HOLD unto the said grantees . . . as joint tenants and not as tenants in common . . .”

The deed was registered in the Registry Office for the Registry Division of West Toronto on the 3rd December 1919. A duplicate original of the deed was thereafter in the possession of the late Thomas Hill or solicitors retained by him, but no copy of the deed was ever given to the plaintiff. He did not know that he and the late Thomas Hill were named therein as joint tenants.

After the purchase of the property and the converting of the premises into a triplex dwelling, the rents were collected by the late Thomas Hill and one-half of the net profits was distributed by him from time to time during his lifetime to the plaintiff.

In or about 1923 Thomas Hill married again. He died on or about the 13th December 1928, leaving surviving him his widow Irene Hill. By his last will and testament he appointed her to be his sole executrix. He devised four separate parcels of real property to various persons, including a life estate in a 6-family apartment house to his wife, but he made no mention in his will of the property in question. He gave the residue of his estate to his wife.

After the death of Thomas Hill the deed to the property is said by the solicitor for the estate to have been in the possession of the personal representative of the deceased, and the inventory of the real estate prepared for the purpose of probate shows an item as follows: “One-half interest in 3 Suite Apartment, No. 154 Cowan Avenue, Toronto . . .”

Mrs. Irene Hill appointed an agent to collect the rents and manage the property. Subsequently another agent was appointed in place of the first one mentioned, and that appointment was made with the knowledge and consent of the plaintiff. The rents were collected by the agents so appointed, and the net profits



from rentals were distributed equally between Mrs. Hill and the plaintiff during her lifetime.

Mrs. Hill died on the 24th April 1937. By her last will she devised the property in question in the following manner: "My House. 154 Cowan Ave is to go to my Sister Elizabeth Randall, after her death, to go to my nephew Charles Randall." She appointed her sisters Blanche Summers, Effie Mitchell and Madeline Latimer to be the executrices of her estate.

After the death of Mrs. Hill the agent appointed by her and the plaintiff continued to collect the rents and distribute the net profits therefrom. One-half of the net profits was paid by the agent to the plaintiff and one-half to Elizabeth Randall from and after 21st May 1937. Elizabeth Randall died, and thereafter the defendant Charles Randall received one-half of the rents directly from the agent from and after the 29th December 1943: the remaining one-half was paid by the agent directly to the plaintiff.

In or about March 1946 the plaintiff decided to dispose of his interest in the property, and consulted a solicitor. Upon examination of the title, it appeared to the solicitor that the plaintiff was a joint tenant. The plaintiff thereupon demanded from the executrices delivery to him of the deed and an accounting of the rents and profits collected since the death of the late Thomas Hill. No claim was made against the estate of Elizabeth Randall or against Charles Randall, and no claim is made in this action by the plaintiff against Charles Randall.

The first question in controversy in the appeal, raised by the appellants other than Blanche Summers, is the right of the plaintiff to the whole interest and ownership in the property. He produces in support of his case a deed of the property showing a grant to him and the late Thomas Hill as joint tenants. He maintains that as survivor he became entitled to the whole right, title and interest in the property upon the death of Thomas Hill. The defendant Blanche Summers, in her statement of defence, denies the allegation in the statement of claim that the plaintiff is the owner in fee simple of the lands and premises and that they were conveyed to the plaintiff and to Thomas Hill to be held by them as joint tenants and not as tenants in common. The defendants Effie Mitchell and Madeline Latimer likewise deny that the plaintiff is the sole owner of the triplex property as alleged in the statement of claim, "and say that the plaintiff is the owner only of an undivided one-half interest therein, and that the other one-half share was owned by the late Thomas Hill, and after his death by Irene Hill, his widow, to whom he devised the same, and is

now owned by the beneficiaries mentioned in the Will of the said Irene Hill, deceased". They further allege "that through some misunderstanding on the part of either the said Thomas Hill, or the Conveyancer who prepared the said Deed, the same was stated as having been made to the plaintiff and the said Thomas Hill, as joint tenants". The defendant Charles B. Randall likewise alleges that there was such misunderstanding, and he claims "a declaration that he is entitled to an undivided one-half share or interest in the said triplex property, and . . . an Order directing the said Deed thereof to be reformed by striking out the words 'as joint tenants', and 'as joint tenants and not as tenants in common' wherever they appear therein".

I cannot find that there was a misunderstanding on the part of the solicitor who prepared the deed of the property. I think that there was no mistake or misunderstanding on the part of the late Thomas Hill in accepting delivery of the deed made to him and to the plaintiff as joint tenants. The late Thomas Hill was not unfamiliar with real estate transactions. On the contrary, he appears to have engaged in numerous transactions of that kind. It is altogether likely that he knew and understood the incidents of joint tenancy. This view is supported by the fact that the late Thomas Hill did not attempt to deal with or dispose of the property in question by his last will and testament. He expressly listed and devised other parcels of real property, and the omission of this particular property indicates to me that he knew and understood that it would pass to the plaintiff by survivorship.

Where a *prima facie* case of joint tenancy has been established, evidence may be given in a proper case to show that the tenants considered themselves tenants in common: *Harrison v. Barton* (1860), 1 John. & H. 287, 30 L.J. Ch. 213, 70 E.R. 756. But no such evidence has been adduced in this case. It was urged that the conduct of the plaintiff after the death of Thomas Hill was inconsistent with the right of a joint tenant and consistent only with his being a tenant in common. I cannot accept that argument because the plaintiff did not at any time know that he was named in the deed of the property as a joint tenant. He did not know that he became sole owner by reason of his surviving the late Thomas Hill. He was uninformed as to the incidents of a joint tenancy. There was nothing in his conduct under the particular circumstances inconsistent with or preventing his assertion of his rights under the conveyance to Hill and himself as joint tenants. As soon as he discovered his right, he acted

promptly to assert his title. I would not disturb the trial judge's finding that he is the sole owner of the lands and premises in question.

The second question arising for determination in the appeal is as to the right of the plaintiff to recover from the appellants Effie Mitchell, Blanche Summers and Madeline Latimer one-half the amount of net profits for the whole or a portion of the period since the death of Thomas Hill. It is to be first observed that the allegation, as it appears in the statement of claim, is that they "continued to collect the rents and profits from the said lands and premises, paying half the same to the Plaintiff and improperly appropriating the remaining half to the use of the said estate of Irene Hill, deceased." The claim, as it is set forth in the prayer for relief, is for "the sum of \$2,967.69, had and received on account of the Plaintiff".

The action, in so far as it seeks to fix liability on those defendants in respect of rents and profits, is an action for money had and received by them. In such an action a plaintiff must show that the defendant received the money in question: *The Township of Chatham v. Houston* (1868), 27 U.C.Q.B. 550. None of the appellants Effie Mitchell, Blanche Summers or Madeline Latimer received any part of the rents after 21st May 1937. It is urged, however, that for the purposes of this action receipt of the rents by the agent in charge of the management of the property was receipt by those appellants. I cannot accept that argument. The agents who collected the rental during the lifetime of Mrs. Hill were agents of her and the plaintiff. There is no evidence that after her death the executrices appointed or adopted an agent for the collection of the rents. The agent who continued to make the collection did not receive the rents as an agent for them. So far as it appears from the evidence he simply continued to pay the rents to the life tenant, Elizabeth Randall, and after her death to Charles Randall. There was no money received by them personally or as executrices. Therefore, in my opinion, the claim against them in respect of rentals must fail.

In the view I take, it is unnecessary to consider at length the applicability of the provisions of The Limitations Act, R.S.O. 1937, c. 118. It is sufficient to say that, in my opinion, the learned trial judge was right in finding that there was no concealed fraud and that s. 31 of The Limitations Act was inapplicable.

My conclusion is that the appeal by the defendants other than Blanche Summers from that part of the judgment declaring that the plaintiff is the sole owner of the property, should be dismissed.



The appeal by all of the defendants from that part of the judgment in respect of rents and profits from the property should be allowed. The application by the respondent to vary the judgment of the Court below in respect of such rents and profits should be dismissed. The judgment of the Court below should be varied and as varied should provide that the claim for rents and profits from the property should be dismissed and that the counterclaim made by the defendant Charles Randall should also be dismissed. There should be no costs allowed to any of the parties in the court below or in this court.

HOGG J.A. (*dissenting in part*):—The facts concerning the matters in issue in this appeal are fully set out in the judgment of the learned trial judge, Mr. Justice Wells, and I, therefore, need only refer to them in brief.

In the year 1919, the plaintiff and the late Thomas Hill, the husband of Irene Hill, now also deceased, purchased the property known as 154 Cowan Avenue, in the city of Toronto. The plaintiff and Hill were intimate friends, and it was on the advice and persuasion of Hill that the plaintiff entered into the transaction and furnished one-half of the purchase price of the property. Some time after the purchase, he also furnished one-half of the money required to pay off a mortgage which was on the property. All of the matters connected with the conveyance to, and the vesting of the title of the Cowan Avenue house in, the plaintiff and Hill were under the sole direction of Hill. The aforesaid property was conveyed to the plaintiff and Thomas Hill as joint tenants, and the deed of conveyance, which is dated 1st December 1919, was duly registered on the 3rd December of the same year. One-half of the net returns, or profits derived from the rents of the aforesaid property were, at all times since its purchase, paid to the plaintiff. He did not have possession of the deed at any time, nor did he have occasion at any time, until long after Hill's death, to request to see it. He said that it was not "until over a year ago" that he was informed by his solicitors, when he contemplated transferring his interest in the property, that such interest was that of a joint tenant and not that of a tenant in common, and, furthermore, that it was not until this time that he was made aware of or knew the significance of a conveyance to grantees as joint tenants.

Thomas Hill died in 1929, and he had appointed his wife, Irene Hill, the sole executrix of his will. He devised certain properties on Woodlawn Avenue and on Hillsboro Avenue in Toronto to his wife and certain other beneficiaries, and devised and bequeath-

ed all the residue of his estate to his wife. The succession duty returns set out among the assets of the estate, a one-half interest in 154 Cowan Avenue. Mrs. Irene Hill died on the 24th April 1937, appointing by her will, as her executrices, the appellants Effie Mitchell, Blanche Summers and Madeline Latimer, and Mrs. Hill devised her interest in the property in question to a sister, Elizabeth Randall, for life, with the remainder to the defendant Charles B. Randall, a son of the said Elizabeth Randall.

There is no doubt in my mind that the evidence establishes that the plaintiff was not aware that his interest in the property was that of a joint tenant, until a comparatively short time ago, and the solicitor who acted for the estate of Mrs. Hill said he had looked at the deed but did not notice that it conveyed the property to the grantees as joint tenants.

The action with which this appeal is concerned was brought by the plaintiff after he became aware of the terms of the afore-said deed, for moneys had and received by the late Mrs. Hill and by her executrices, consisting of the rents and profits derived from the property in question, from the date of the death of Thomas Hill.

The evidence does not support the allegation made on behalf of some of the appellants that it was through a misunderstanding on the part of Thomas Hill or on the part of the solicitor who prepared the deed in question, that the property was vested in the grantees as joint tenants, instead of as tenants in common, nor does the evidence establish that it was the intention of either Hill or the plaintiff that the survivor should not take the property. I agree with the conclusion reached by the learned trial judge that the transaction was not a case of a joint undertaking or partnership by way of trade or upon the hazard of profit and loss, where the ordinary operation of the rule respecting joint tenants may be excluded. Furthermore, because of the facts, it cannot be found that any question of a resulting trust arises.

In works on the law of evidence, as, for example, Phipson, 8th ed. 1942, at p. 565, there is to be found the statement that it has been held that a joint tenancy under a document may be proved to be a tenancy in common, by the conduct of the parties. This proposition apparently is based chiefly upon the judgment in *Harrison v. Barton* (1860), 1 John. & H. 287, 30 L.J. Ch. 213, 70 E.R. 756.

The ordinary rule of law governing the construction of instruments in writing was set out in the following words by the Earl

of Halsbury L.C. in *The North Eastern Railway Company v. Lord Hastings*, [1900] A.C. 260: “. . . written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself.” In the case, however, of an ambiguity in connection with an instrument, or if the construction is doubtful and the doubt cannot be removed in any other way, reference may be had to acts done in pursuance of the instrument. Under such circumstances, the acts of the parties, subsequent to the contract, may be material to show that a writing does not express that which the parties intended to express in it: 10 Halsbury's Laws of England, 2nd ed. 1933, pp. 266, 274.

The principle was expressed in the following words by Sir James Wigram, V.C. in *Monro v. Taylor* (1850), 8 Hare 51, 68 E.R. 269 at 272: “The acts of the parties subsequent to the agreement may be material to shew that a writing does not express that which the parties intended to express in it; and proof of that may be a reason why this Court should refuse to act upon the written agreement. *But* that is a very different thing from deducing from the acts of the party the meaning of the agreement itself”.

The same subject was considered in *Chapman v. Bluck* (1838), 4 Bing. N.C. 187, 132 E.R. 760; *Sadlier et al. v. Biggs* (1853), 4 H. L. Cas. 435, 10 E.R. 531, and in *W. T. Lamb and Sons v. Goring Brick Company, Limited*, [1932] 1 K.B. 710.

The above-mentioned authorities hold that the acts of the parties cannot be regarded in arriving at the meaning of the instrument itself, but may be material in arriving at their real intention.

I have already referred to the case of *Harrison v. Barton*, where the Court had before it for determination the same question as is now under discussion. It was there held that evidence of ordinary circumstances and of subsequent dealings was admissible to show that an estate purchased by two sons of a deceased testator, under a power given to them by their father's will, was held by them not as joint tenants but as tenants in common. The facts established that after the purchase of the estate each of the sons executed a settlement giving power to his trustees to invest the trust funds in “one undivided moiety”. Instructions were given to a solicitor to prepare a conveyance to the two brothers as tenants in common, and such instrument was prepared, although apparently not executed. After the death of one of the brothers, the survivor allowed one-half of the rents to go



to the representatives of his deceased brother. Sir W. Page Wood V.C., in delivering judgment, said at p. 295: "... equity will not hold a purchase joint if there are circumstances from which it can be collected that a joint tenancy was not in contemplation—I am of opinion that the instructions to the solicitor, the draft prepared, the power given to the trustees and the continued division of the rents after the death of Gilbert [one of the brothers] are sufficient to countervail the joint form of contract."

The sole subsequent act on the part of Thomas Hill or the plaintiff which might support the view that they as grantees did not intend the land to be held in joint tenancy, notwithstanding the language of the deed, is the fact that after the death of Thomas Hill, the plaintiff allowed one-half of the rents to be dealt with as if they were assets of the estate of Thomas Hill, and afterwards, of the estate of Irene Hill. This circumstance is explained by the fact that the plaintiff was not aware until a very considerable time after Thomas Hill's death that the property had been conveyed to himself and Hill as joint tenants. The above-mentioned act on the part of the plaintiff, done under a mistake of fact, is not, in my opinion, sufficient to bring this case within the rule laid down in the judgment in *Harrison v. Barton*. I am unable to find, after careful consideration of the evidence, any act on the part of the plaintiff, or any circumstance which shows the intention of the grantees to the deed in question to be other than that the property was to be conveyed to them as joint tenants. Such being the case, the intention of the grantees to the conveyance must be taken to be expressed therein, and as a result the whole title and interest in the said property, upon the death of Thomas Hill, became vested in the plaintiff.

A more difficult question presented for solution is with respect to the claim of the plaintiff for the half of the rents and profits from the property which he did not receive as its sole owner after the death of Thomas Hill.

The evidence shows that commencing with the year 1935, one-half of the net income from 154 Cowan Avenue was paid to Mrs. Hill until January 1937; then after her death it was paid to her estate for several months and thereafter up to August 1943 to Mrs. Elizabeth Randall. After this latter date, payment was made to the appellant Charles Randall.

It is contended by Mr. Robinette on behalf of the appellant Blanche Summers, one of the executrices, that in an action for money had and received it must be proved that the money was received by the defendant to the action and that in the present

case the moneys claimed by the plaintiff were not paid to or received by the executrices, but were paid, after Mrs. Hill's death, to Mrs. Randall, and after her death to the appellant Charles Randall, through the medium of Mr. C. I. F. Whitney and Messrs. Reed Brothers, appointed by the executrices as their agents to collect the rents from the property in question and pay one-half to those who were entitled to such rents by the provisions of Mrs. Hill's will. The evidence shows that the plaintiff confirmed the appointment of the aforesaid agents and adopted them as his agents for the purpose of collecting the said rents.

I think that the act of Mr. Whitney and afterwards that of Reed Brothers, done within the scope of their authority as agents, in receiving the rents as such agents, must be considered as the receiving of the moneys by their principals, the appellant executrices: see *Standish v. Ross* (1849), 3 Ex. 527, 154 E.R. 954.

In the alternative, counsel argued that if it should be held that the executrices had received one-half of the rents since 1937, nevertheless an action would not lie against them for moneys paid under a mistake of fact, if they received such moneys for the sole purpose of handing them over at once to those beneficially entitled.

Because of a mistake of fact on the part of the plaintiff, which mistake was shared by the executrices in assuming that the deed of the Cowan Avenue property was a conveyance to the plaintiff and Thomas Hill as tenants in common and not as joint tenants, the rents from the property were paid to the agents of the executrices and the plaintiff, who were directed by the executrices to pay, and did pay, one-half of such rents to Mrs. Randall or to Charles Randall. As I understand this contention, it is that the executrices, through the medium of their collecting agents, had received the rents merely to deliver them up to those entitled to them under the will of Mrs. Hill and could thus be said to be acting in the capacity of agents for that purpose.

The rents were not revenue from assets of the estate of Mrs. Hill, as the estate had no right or interest in the Cowan Avenue property after Thomas Hill's death. The whole of the rents from that property belonged solely to the plaintiff, and the executrices, acting on behalf of Mrs. Hill's estate through their agents, were dealing with the plaintiff's money. I think it must be concluded that both the plaintiff and the executrices had, at the time, the honest belief that one-half of the rents was part of the revenues of Mrs. Hill's estate, and as a consequence the

executrices thought they were under duty to pay this money over to the appellant Randall.

In *Continental Caoutchouc and Gutta Percha Company v. Kleinwort, Sons and Co.* (1904), 20 T.L.R. 403, Collins M.R. said, at p. 405: "It is clear law that *prima facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party and has handed it on is no longer accountable to the sender. In such case he is a mere conduit-pipe and has not had the benefit of the windfall . . . Once place him in the position of a person who has a right to receive and apply the fund for his own benefit, and he is at once taken out of the category of mere intermediaries for whom alone the defence is available that they have acted as such and passed on to another the liability to refund the windfall." In that case a sum of money, which was to have been paid to a certain company, was paid, by a mistake of a clerk of the plaintiffs, to the defendants.

The principle is discussed in the later case of *British American Continental Bank v. British Bank for Foreign Trade*, [1926] 1 K.B. 328, also in our own court in *E. J. Maxwell Ltd. v. Bank of Nova Scotia*, 63 O.L.R. 323, [1929] 1 D.L.R. 616.

In the Supreme Court of Canada, in *The Bank of Montreal v. The King* (1907), 38 S.C.R. 258, Idington J., at p. 280, uses the following language: "Let us bear in mind that the action for money had and received by means of which this right has usually been asserted, rests upon the principle that *prima facie* it is against equity and good conscience that the party who received it should retain it, and remember further that in many instances this *prima facie* case is answered by virtue of conditions existing at the time of payment, or subsequent events creating, so to speak, a countervailing equity that would make it against equity and good conscience to insist on the return of the money."

The question of the recovery of money paid by mistake of fact was also considered in the Supreme Court of Canada in *The Dominion Bank v. The Union Bank of Canada* (1908), 40 S.C.R. 366, where Duff J. said, at p. 382:

"But is the mere fact that the receiver, while ignorant of the mistake, has changed his position by paying the money over to a



third person to whose orders it was subject, a sufficient answer in itself (within this principle) to the demand of the payer?

"I think the effect of the decisions is that that circumstance alone is not an answer, unless the receiver can bring himself within the rule applicable to moneys paid to an agent in his character of agent who has paid it over or accounted for it to his principal."

Even if the executrices could be regarded as occupying merely the position of agents, when dealing with actual revenues of the estate, in directing such revenues to be paid to those entitled under the will, they would not be acting in that capacity in dealing with moneys to which the estate, and therefore to which the beneficiaries under the will, had no claim.

To use the words of Collins M.R., the estate of Mrs. Hill "had the benefit of the windfall", and although the amount of the rents had been paid over to a third party by mistake, nevertheless the estate would be liable to refund such money.

The learned trial judge held that the appellant Randall was under the same liability as the appellant executrices to refund to the respondent the moneys received by him which consisted of the rents directed to be paid to him. It is true that Randall was paid one-half of the amount collected as rents from the Cowan Avenue property by the collecting agents, but it was the estate for whom, as principal, these agents were acting. In my view, Mr. Randall was simply a third party, in so far as the respondent was concerned, to whom the appellant executrices were under obligation, if the estate had funds sufficient for the purpose, to pay the legacy conferred upon him by the will of Mrs. Hill. There was no privity between the respondent and Randall. It was not Randall who took the rents actually belonging to the respondent. These rents were taken by the executrices purporting to act for the estate, although these appellants had given orders that the collecting agents should pay such rents directly to Mr. Randall.

In *The Colonial Bank v. The Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84, C.R.[9]A.C. 219, the appeal to the Judicial Committee of the Privy Council arose from an action for the recovery of moneys paid by mistake. Lord Hobhouse said, at p. 85: "The plaintiffs have to shew that the money was not received by the defendants to their own use; that there was privity between them; and that the plaintiffs occupied such a relation to the defendants that they are entitled to recall the money out of the defendants' hands into their own."

It is true also that the plaintiff allowed the rents in question to be paid to the executrices, although he could readily have ascertained what was the language, and what was the meaning, of the deed to himself and Thomas Hill; but as was said by Lord Lindley in *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49 at 56, C.R. [13] A.C. 41; “. . . it was long ago decided in *Kelly v. Solari* (1841), 9 M. & W. 54 [152 E.R. 24], that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed.” I do not think it can be said, because the mistake was mutual on the part of the plaintiff and the executrices, that there arose a condition which created a countervailing equity. In my view, there is nothing which makes it against equity for the plaintiff to recover the moneys in question from the estate of Mrs. Hill.

The plaintiff is entitled to the rents and profits of the property no. 154 Cowan Avenue received by the appellant executrices for a period not exceeding six years prior to the issue of the writ. I agree also with the conclusion of the learned trial judge that s. 31 of The Limitations Act, dealing with cases of concealed fraud, has no application to the facts of this case. I concur with the judgment that the Statute of Limitations is a bar to the recovery of the rents derived from the said property prior to the 2nd May 1940.

Whether or not the executrices might have a claim over against Mr. Charles Randall was not in issue in this action.

For the reasons given, the appeal on behalf of the executrices, in my opinion, should be dismissed with costs. The appeal by Charles Randall, in so far as he is ordered by the judgment at trial to make repayment to the respondent, should be allowed with costs.

AYLESWORTH J.A. agrees with LAIDLAW J.A.

*Judgment varied, HOGG J.A. dissenting in part.*

*Solicitors for the plaintiff, respondent and cross-appellant: Chitty, McMurtry, Ganong, Wright & Keith, Toronto.*

*Solicitors for the defendants Mitchell, Latimer and Randall, appellants: Kappeler & Kappeler, Toronto.*

*Solicitor for the defendant Summers, appellant: John J. Robbinette, Toronto.*

## [COURT OF APPEAL.]

**Household Finance Corporation Limited v. Foster et al.**

*Suretyship—Relations between Creditor and Surety—Duties of Creditor—Chattel Mortgage—Failure to Re-register or File Renewal Statement—The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181, ss. 22, 24.*

There is a well-established rule of equity by which a surety, upon payment of the debt, is entitled to the benefit of every security held by the creditor, even though it was neither contracted for by the surety nor known to him, and even though the security did not come into existence until after the surety became bound. But there is no case which goes so far as to hold that mere inaction by the creditor, as a result of which the value of the security is destroyed, will discharge the surety, unless there is on the creditor some duty, arising from express or implied obligation, to do that which is omitted. *The Queen v. Fay* (1878-9), 4 L.R. Ir. 606; *The Trust and Loan Company of Canada v. Würtele et al.* (1905), 35 S.C.R. 663, discussed.

Accordingly, where the payee of a promissory note takes a chattel mortgage as security for payment of the note, endorers of the note (who have no contract with the creditor except such as arises from the mere endorsement) will not be discharged by the creditor's failure to re-register the chattel mortgage, on the removal of the goods into another county, within the time prescribed by s. 22 of The Bills of Sale and Chattel Mortgage Act, if the creditor did not know of the removal in time to comply with the section. The creditor is under no obligation, based solely upon the equitable rule, to maintain such guard upon the mortgaged goods as will prevent their removal into another county without the creditor acquiring knowledge in time to re-register his mortgage.

*Quære*, whether the creditor would be under any obligation to the sureties as to re-registration if it had knowledge in time to take the necessary steps.

AN APPEAL by the plaintiff from the judgment of Factor Co. Ct. J., of the County Court of the County of York, dismissing the action against the respondents.

2nd December 1948. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

*R. S. Joy*, for the plaintiff, appellant: There was no positive act by the plaintiff that avoided the chattel mortgage, or destroyed its value as a security, and mere passiveness on the part of a creditor will not release a surety: *The Trust and Loan Company of Canada v. Würtele et al.* (1905), 35 S.C.R. 663 at 677-8. There was no agreement between the plaintiff and the respondents that the security would be kept alive, and the respondents did not expressly require us to do so: *The Trust and Loan Company of Canada v. Würtele et al.*, *supra*; *Macdonald et al. v. Bell* (1840), 3 Moo. P.C. 315 at 332-3, 13 E.R. 129; *The Queen v. Fay* (1878-9), 4 L.R. Ir. 606 at 615.



The respondents could have obtained a certified copy of the chattel mortgage and filed it in the county of Leeds, and they cannot complain of the plaintiff's failure to do so. If an act is one which could have been performed by the surety, he cannot complain of the creditor's failure to perform it, nor is he discharged by that failure: *The Queen v. Fay, supra*, at p. 617.

There is no evidence of negligence on the plaintiff's part. Section 22 of The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181, is clear in its terms, and there is no authority for the proposition that time runs only from the creditor's knowledge of the removal. The section is mandatory: *Reick v. Neeb*, [1948] O.R. 459 at 465, [1948] 3 D.L.R. 711; *Clarke v. Bates* (1871), 21 U.C.C.P. 348. The only person who could be held to be negligent here was the respondent Lennox, who assisted in the removal of the chattels, and did nothing about re-registration of the chattel mortgage. There is a clause in the chattel mortgage which permits the plaintiff, as mortgagee, to discharge "any article from these presents", and this would permit the plaintiff to release the security if it saw fit. In any event that clause cannot be construed against us, since it is in the document relied upon by the respondents.

Once the goods were removed to Westport, and mingled with the other furniture in a large house there, the chattel mortgage was worthless, and the respondents suffered no loss through the failure to keep it alive: *Carter v. White* (1883), 25 Ch. D. 666 at 670. The test is not whether Lennox, as a neighbour, could have identified the chattels covered by the mortgage, but whether, from the description in the mortgage itself, a person charged with the execution of process could have identified them: *Nolan v. Donnelly et al.* (1883), 4 O.R. 440 at 441. [ROBERTSON C.J.O.: The issue in that case was whether the chattel mortgage was valid, which is quite different from the point you are now making. Surely the burden of proof on this issue is on you. The goods might all have been tagged.] Once we show that the furniture was moved into a large house, the onus is cast upon the respondents to show that it could have been identified.

*E. A. Goodman*, for the respondents: It is an incident of suretyship that the surety is entitled to the benefit of any security that may have been given by the principal debtor to the creditor, and a duty is therefore cast upon the creditor to see that the

security remains intact and in the same condition as when it was received. Here the value of the security was completely destroyed. There was a material variation of the contract between the creditor and the sureties, and the sureties are therefore discharged. There is no necessity for showing an agreement to keep the security alive; the rights in such circumstances flow from the equitable doctrine of indemnification. Even if a surety does not know of the existence of a security, he is still entitled to the benefit of it: *Mayhew et al. v. Crickett et al.* (1818), 2 Swan. 185, 36 E.R. 585; De Colyar on Guarantees, 3rd ed. 1897, p. 322. [ROBERTSON C.J.O.: How far does the creditor's obligation go? Here the furniture was in use; do you suggest that there was a duty to keep it in good condition?] There is at least a duty to keep the security alive, and that duty is absolute: *The Merchants' Bank of Canada v. McKay et al.* (1888), 15 S.C.R. 672. [ROBERTSON C.J.O.: There the bank committed a positive act, by giving up something; that is not the case here.]

Negligence need not be proved; *Blest v. Brown* (1862), 4 DeG. F. & J. 367, 45 E.R. 1225; *Doe et al. v. The Canadian Surety Company; Blonde v. Doe et al.*, [1937] S.C.R. 1 at 19, [1937] 1 D.L.R. 145, 4 I.L.R. 43. There was a material variation in the contract in the *Blest* case, and it was held that the surety was bound only according to the proper meaning of the contract, even if the change is for his benefit. We rely also on *Wulff and Billing v. Jay* (1872), L.R. 7 Q.B. 756, which is very similar on its facts.

Once the respondents show that the mortgage was not re-registered, the onus shifts to the plaintiff to establish at least that it had no knowledge of the removal of the goods: *Gray-Campbell Limited v. Reimer et al.*, 11 Alta. L.R. 437, [1917] 2 W.W.R. 991, 36 D.L.R. 181.

In any event, payments under the chattel mortgage were in arrear, and the plaintiff could have realized by seizure: *Bank of Toronto v. Roeder et al.*, 14 Sask. L.R. 465, [1921] 3 W.W.R. 483, 63 D.L.R. 459. [ROBERTSON C.J.O.: What do you say as to the act of Lennox in helping with the removal of the goods?] There was nothing wrong with the moving of the goods; the fault lay in not obtaining the consent of the plaintiff, and not even notifying it. Lennox had a right to assume that the removal was with the plaintiff's consent. He was ignorant of the necessity for

re-registration, and this whole matter was within the control of the creditor alone: *Polak et al. v. Everett* (1876), 1 Q.B.D. 669.

As to the clause permitting the plaintiff to release particular goods from the mortgage, this cannot affect the sureties' position. There could be no such release according to the equitable rule, and the plaintiff must come into court with clean hands. Such clauses are construed strictly against the creditor, who must keep the security intact: *Traders Finance Corporation Limited v. Ross et al.*, [1942] O.R. 618, [1943] 1 D.L.R. 49; *Holland-Canada Mortgage Company Limited v. Hutchings et al.*; *Holland-Canada Mortgage Company Limited v. The Royal Trust Company et al.*, [1936] S.C.R. 165, [1936] 2 D.L.R. 481. In any event, what we complain of here is not a release, but a failure to keep the mortgage alive.

There was a material change in the contract between the plaintiff and the principal debtors, whereby the terms of payment were altered, and the effect of this, having been done without our knowledge, is to discharge the sureties: *Samuell v. Howarth* (1817), 3 Mer. 272, 36 E.R. 105. There need not be a new agreement, but merely a variation in the terms of the old one: *Blest v. Brown*, *supra*.

As to the description of the goods, the cases digested in 7 Can. Abr. 757 refer to identification "after proper inquiries have been instituted". On that basis, the goods could easily have been identified.

The cases cited for the appellant are distinguishable from the case at bar. Both *Macdonald v. Bell* and the *Würtele* case were decided under the Quebec Civil Code. *The Queen v. Fay*, *supra*, was a case in which the Crown was a party, and it is therefore not an authority in a case between subjects.

*R. S. Joy*, in reply: There was no obligation on us to seize the goods, and we should have taken a chance had we done so. *Wulff and Billing v. Jay*, *supra*, was distinguished in both *The Queen v. Fay*, *supra*, and *The Trust and Loan Company of Canada v. Würtele et al.*, *supra*. *The Merchants Bank of Canada v. McKay et al.*, *supra*, was decided before the *Würtele* case and in any event it was a case where a security was lost through the positive act of the creditor.



The respondents seek to place the onus on us, but they allege negligence in their statement of defence, and the onus must therefore be on them to prove it, which they have failed to do.

As to the so-called variation in the terms, we merely did the best we could to collect our debt. We did not agree to vary the terms of the contract, but merely obtained as much as we could in the circumstances.

*Cur. adv. vult.*

24th January 1949. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the plaintiff in the action from the judgment of Judge Factor, of the County Court of the County of York, dated 7th October 1948, whereby he dismissed with costs the plaintiff's action against the present respondents, Arthur J. Lennox and Harold Wrigglesworth.

The action was brought upon a promissory note, dated 31st December 1945, for \$1,618, made by the defendants Robert Gordon Foster and Doreen Foster, payable to the appellant, whose corporate name was then Campbell Finance Corporation Limited. The respondents endorsed the note, but were not otherwise parties to it. In their statement of defence they admit that they endorsed the note as accommodation, and for the purpose of guaranteeing repayment thereof by the makers, Robert Gordon Foster and his wife, Doreen Foster. The note being in default, with \$966.16 and interest still unpaid, this action was brought on 4th November 1947 against the makers and against the two endorsers. The makers of the promissory note did not defend the action and judgment was signed against them for default. The respondents, on their part, defended the action. Presumably the respondents, in accordance with their admission already mentioned, are to be regarded as subject to all the provisions of The Bills of Exchange Act, R.S.C. 1927, c. 16, respecting endorsers, as provided in s. 131 of that statute: see *Robinson v. Mann* (1901), 31 S.C.R. 484; *Grant v. Scott*, 59 S.C.R. 227, 50 D.L.R. 250, [1920] 1 W.W.R. 186; *Gallagher v. Murphy et al.*, [1929] S.C.R. 288, [1929] 2 D.L.R. 124.

The only defences set up were that, contemporaneously with the making of the promissory note and the guaranteeing of payment thereof by the respondents, the appellant obtained from

the makers of the note a chattel mortgage as collateral security for the amount of the note, upon the household furnishings and equipment of the makers contained in their home at 189 Rumsey Road, in the city of Toronto. This chattel mortgage was filed in the office of the Clerk of the County Court of the County of York. The respondents allege that the appellant, through neglect, failed to renew the chattel mortgage in accordance with the provisions of The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181, and also, through neglect, failed to register a copy of the chattel mortgage, certified under the hand of the Clerk of the County Court of the County of York and the seal of that Court, with the Clerk of the County Court of the County of Leeds, as required under s. 22 of The Bills of Sale and Chattel Mortgage Act, upon the permanent removal of the goods and chattels covered by the mortgage from the county of York to the town of Westport, in the county of Leeds.

The respondents further allege that, at the date of the institution of this action, their codefendants, the makers of the promissory note sued upon, were indebted in large sums to other creditors, and that by reason of the failure of the appellant to renew the chattel mortgage and to file a certified copy of it in the county of Leeds, as required by the statute, the chattel mortgage became null and void as against the creditors of their codefendants.

The respondents allege that they were always ready and willing, and offered, to pay the appellant the amount of its claim against their codefendants, upon the appellant turning over to the respondents the security held by the appellant when the respondents guaranteed the promissory note in question, but that by reason of the appellant's failure and neglect the value of the security of the chattel mortgage has been destroyed, and that the value of the goods and chattels covered by the chattel mortgage being in excess of the amount of the appellant's claim, the appellant has no claim against them.

Not many of the material facts are in dispute. The making of the chattel mortgage covering the home furnishings of the Fosters, located at 189 Rumsey Road, Toronto, is admitted. It is admitted that the mortgage was filed with the Clerk of the County Court of the County of York on the 2nd January 1946. The defendant Robert Gordon Foster procured the signatures of

the respondents as endorsers of the promissory note, and in doing so showed respondent Lennox the chattel mortgage given as collateral security to the note. He told respondent Wigglesworth that he had given appellant security for the note. There is no evidence that appellant had knowledge of the fact that respondents endorsed the note for the accommodation of the makers, or knew what arrangement existed between them. There is no evidence of any contract or agreement between appellant and respondents, other than such as arose from respondents' endorsement of the promissory note.

Foster was a salesman or manufacturer's agent, and in July 1946 he made Westport, in the county of Leeds, his headquarters. Sometime in September 1946 Foster moved his family and his furniture from Toronto to Westport. The respondent Lennox helped him to move, and knew that the furniture was removed to Westport, and that Foster, with his family, thereafter lived there. There is no evidence that knowledge of any of these things reached appellant until January 1947.

The learned County Judge, placing his own interpretation upon certain notations on the back of appellant's ledger-sheet and headed "Record of Collection Follow-up", drew the inference that the appellant knew on 1st September 1946, that Foster had moved and was working in Westport. He considered that it was the appellant's duty to be on guard and ascertain whether the furniture had gone with him. It is here the substantial dispute as to the facts begins. The appellant denies that, prior to January 1947, it had knowledge of Foster's change of residence or of the removal of the mortgaged goods and chattels to the county of Leeds. The appellant further says that it owed no duty to the respondents, as guarantors of the promissory note, to be on guard and to ascertain whether the mortgaged goods had been removed from the county of York to the county of Leeds, or elsewhere.

The learned County Judge, in reaching his conclusion that appellant knew of the removal of Foster to Westport on 1st September 1946, says: "The ledger-sheet (ex. 3) has the following endorsement on the back thereof under date '1-9' which I interpret, in the light of the other dates set out in the column, to mean 1st September 1946—'WW pay and advise by 1-15. Now living and working (for self) in Westport, Ont.'" The learned



judge took this to mean that the appellant knew on 1st September 1946 that Foster had moved and was working in Westport, Ontario, and he proceeds upon that finding to say that: "It was its duty to be on guard and ascertain if the furniture had gone with him, and a reasonable assumption is that the plaintiff knew at that time that the furniture had been so removed."

Whatever might have been appellant's duty to respondents if, on 1st September 1946, it had the knowledge disclosed by the entry in its record, it is not necessary to discuss, for, with all respect to the learned judge, it is as plain as it could well be that the date "1-9" means 9th January and the year is 1947. There are sixteen dates in all entered in the column headed "Dates", and they are all made with the number of the month first and the day of the month next. The first entry is dated "3/29", indicating the 29th day of the 3rd month. This system is consistently followed throughout. The entry immediately above the entry "1-9", which the trial judge interprets as 1st September 1946, is "12/27", which, obviously, can only be read as the 27th day of December. There is no 27th month. The next preceding entry is "11-8-46", meaning the 8th day of November 1946. The same system of dating is to be found on the front of the ledger-sheet, where the first entry is under date "12/31/45", meaning the 31st December 1945. It may be well to note that this exhibit was put in evidence by counsel for respondents.

Section 22 of The Bills of Sale and Chattel Mortgage Act requires that in the event of the permanent removal of the goods and chattels to another county, a certified copy of the chattel mortgage shall be filed in such other county within two months from such removal. It is beyond question that if appellant had no knowledge of Foster's change of residence until January 1947, and had, therefore, no reason until then even to consider the propriety of filing a certified copy of the chattel mortgage in the county of Leeds, it was too late then to comply with the requirement of s. 22 of The Bills of Sale and Chattel Mortgage Act. The removal to the county of Leeds was some time in September 1946. The chattel mortgage was, therefore, void as against Foster's creditors as of a date in November 1946.

It is not necessary to go into the question of the omission to file a renewal statement under s. 24 of the statute, as to which respondents also allege neglect by which they were injured. By

subs. 2 of s. 24 the time for filing a renewal statement, where there has been a removal of the goods and chattels to another county and a certified copy of the mortgage has been filed in such other county, is within one year, reckoned from the date of the registration of such certified copy, and the renewal statement is to be registered in the office in which the certified copy is registered. The omission to register a renewal statement after the mortgage had become void against creditors, because the requirement of s. 22 had not been met, did respondents no injury.

The trial judge made no finding of neglect or laches on the part of the appellant that led to the loss of the security of the chattel mortgage, other than that founded upon his conclusion that appellant, on 1st September 1946, had knowledge of the facts entered in its record under date of 9th January 1947. This conclusion of the learned judge being founded upon an obvious error as to the date of the entry, the respondents have no finding of the trial judge that will support their defence of neglect or laches on the part of the appellant that resulted in the loss of the mortgage security.

We heard much argument, and many cases were cited, on the question of the duty resting upon the appellant to protect the security it held from the principal debtors, so that it might be made available to the respondents as sureties, on their discharging the debt. The learned County Judge has also dealt with that question to some extent in his reasons for judgment. A number of the cases cited to us, and some of the cases cited by the learned judge in his reasons for judgment, have really nothing to do with the case in hand. As I have already pointed out, there was no contract entered into between the appellant and the respondents other than such contract as arose from the respondents' endorsement of the promissory note sued upon. There was no contractual relationship between them with respect to the mortgage security given the appellant by the Fosters, the principal debtors. Such right or interest as the respondents had in that security rested, not upon contract, but upon the rule of equity by which, upon payment of the debt, the surety is entitled to the benefit of every security held by the creditor, even though neither contracted for by the surety, nor known to him, and even though not existing until after the surety became bound.

This right of the surety has been described in this way in Snell's Principles of Equity, 22nd ed. 1939, p. 489: "The chief right of the surety against the creditor is a negative one. A creditor must do nothing to prejudice the surety's right to obtain indemnity from the principal debtor or contribution from co-sureties; if he does so, the surety will be either wholly or partially discharged from his liability."

In Story's Equity Jurisprudence, 14th ed. 1918, vol. 1, p. 432, it is said: "... there is no positive duty incumbent on the creditor to prosecute measures of active diligence."

In DeColyar on Guarantees, 3rd ed. 1897, p. 449, it is said: "To discharge the surety, it must appear that such loss was in some way attributable to the fault of the creditor. And, even should a security prove absolutely worthless, whether it was so originally or whether it became so afterwards, the surety is not discharged unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor."

These statements of the principle, in textbooks of recognized authority, support the submission of counsel for appellant that it was necessary, in any event, for the respondents to show more than mere laches or neglect on the part of the appellant, even if it could be held, on the evidence in this case, that such laches or neglect was shown. It is difficult, however, to find the point conclusively decided by cases of authority. Appellant's counsel cited *The Queen v. Fay* (1878-9), 4 L.R. Ir. 606. No doubt, it was said in that case that, taking the case as one between subject and subject, the laches of the creditor does not discharge the surety, but that the foundation of such discharge is the breach of an obligation due by the creditor to the surety. The value of the decision, however, upon this point is impaired by the circumstance that no laches can be imputed to the Crown, and, therefore, the question as between subject and subject did not arise for decision.

There is a useful review of earlier cases in the judgment of Chief Baron Palles in the case of *The Queen v. Fay, supra*. This case is referred to in the judgment of Mr. Justice Nesbitt in *The Trust and Loan Company of Canada v. Würtele et al.* (1905), 35 S.C.R. 663 at 677-8. In his judgment Mr. Justice Nesbitt, who delivered the judgment of the majority of the Court, refers to the statement in Brandt on Suretyship, 2nd ed., ss. 444 and 448, where



the doctrine is laid down that omission is equivalent to commission. Mr. Justice Nesbitt says that he does not think that the cases go that length, and that unless there is some duty to do that which is omitted, such duty arising from express or implied obligation, mere passiveness by the creditor will not release the surety.

In the *Würtele* case the obligation of the creditor to the sureties, the failure of the creditor to observe which was held to discharge the sureties, was found to have arisen under the instrument creating the suretyship. By this instrument the debtor assigned a policy of life insurance by way of pledge, as security for the loan, and certain rents were made available to the creditor as a fund out of which the premiums on the insurance policy might be paid. It was held that the sureties had the right to rely upon the creditor to avail itself of the provision made for payment of the premiums, and the consequent loss of the security operated to discharge the sureties *pro tanto*.

I have read the cases cited in the judgment appealed from, and the numerous cases cited in argument, and many others. In some of the cases the surety has been discharged by dealings by the creditor with the principal debtor, by which either the debtor has been released, or there has been a binding arrangement with the debtor to give him time, or some other alteration has been made in the obligation of the principal debtor, the performance of which the surety has guaranteed. In other cases the surety has been held never to have become bound because some other person who was intended to be a party to the instrument of suretyship has not been procured to sign it, or some security that it was agreed should be furnished, is not obtained. The release of a co-surety or the surrender of a security has, in other cases, operated to discharge a surety, either wholly or *pro tanto*. I have found no case, however, to support the proposition, vital to the defence in the present case, that an obligation to the sureties arising only from the rule of equity that I have already referred to, and from nothing else, was placed upon the creditor, that required the creditor to maintain such guard upon the mortgaged goods and chattels as would prevent their removal into another county without the creditor acquiring knowledge of such removal in time to permit the creditor to comply with the requirements of s. 22 of The Bills of Sale and Chattel Mortgage Act. I do not think that it is necessary to reach any conclusion upon the

question of appellant's obligation to the sureties to comply with s. 22, in the event that appellant had acquired knowledge of the removal of the goods to the county of Leeds within two months of such removal, for it is not shown that appellant had such knowledge within that time, although it is right to say this much, that I know of no authority for imposing that obligation upon the creditor in the circumstances of this case.

For these reasons the appeal should be allowed, with costs, and there should be judgment for the appellant against both respondents for the principal and interest sued for, with costs of action.

*Appeal allowed with costs.*

*Solicitors for the plaintiff, appellant: Taylor & Joy, Toronto.*

*Solicitors for the defendants Lennox and Wrigglesworth, respondents: Goodman & Goodman, Toronto.*

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## [COURT OF APPEAL.]

**Canadian William A. Rogers Limited v. Lucerne Metal & Plastic Products Limited.**

*Sale of Goods—Implied Warranties—Burden of Proof on Buyer—The Sale of Goods Act, R.S.O. 1937, c. 180, s. 15(a), (b).*

Where the circumstances of a sale of goods are such that clauses *a* and *b* of s. 15 of The Sale of Goods Act apply to the contract, there are absolute warranties by the seller that the goods are reasonably fit for the purpose for which they are intended and are of merchantable quality. The buyer, in order to be entitled to damages for breach of these warranties, need not show the cause of the defect in the goods, but he must prove that the defect, latent or patent, existed when the goods were delivered by the seller. *Randall v. Newson* (1877), 2 Q.B.D. 102; *Wallis v. Russell*, [1902] 2 I.R. 585, applied.

AN APPEAL by the defendant from the judgment of Kelly J., awarding damages for breach of warranty under a contract for the sale of goods.

4th November 1947. The appeal was heard by ROBERTSON C.J.O. and ROACH and AYLESWORTH JJ.A.

G. W. Mason, K.C. (A. H. Friedgut, K.C., with him), for the defendant, appellant: There was nothing but conjecture to support the trial judge's findings. The onus was on the plaintiff to prove that the cases were defective, and that we were responsible for the defects, and this onus was not met. The cases relied on by the respondent are inapplicable, since in all of them the cause of the trouble was either proved or admitted. This remark applies to *Frost v. The Aylesbury Dairy Company, Limited*, [1905] 1 K.B. 608; *James Drummond & Sons v. E. H. Van Ingen & Co.* (1887), 12 App. Cas. 284; *John Macdonald & Company Limited v. The Princess Manufacturing Company, Limited*, [1926] S.C.R. 472, [1926] 1 D.L.R. 718; *Re Scotland Woollen Mills Co. Limited*, 23 O.W.N. 609, [1923] 2 D.L.R. 274, 3 C.B.R. 636. [ROBERTSON C.J.O.: The plaintiff says that it received the cases, nothing was done to them, and they were found to be defective, and that consequently there must have been an inherent defect in them.] It must show the cause. The plastic cases were shipped by us to a factory, where they were fitted with bases before being sent on to the plaintiff. [AYLESWORTH J.A.: Is it not, in the final analysis, a question as to whose is the responsibility, and is that not a matter of



inference for the trial judge?] *Grodwards Co. v. Kirkland Lake Gold Mining Co.* (1919), 17 O.W.N. 300, is authority against that proposition.

This was a sale by sample, within s. 16 of The Sale of Goods Act, R.S.O. 1937, c. 180, and the cases sent by us were according to the sample. The plaintiff of course relies on s. 15(b) of the Act, but both sections must be read together on the question of merchantability. The defendant did use a trade article, plexi-glass, but the cases were not that article, but were rather made from it. [ROACH J.A.: The sample was only as to design.] [ROBERTSON C.J.O.: What the defendant was trying to sell was plexiglass, not the model.] It is interesting to determine whether s. 16(2) excludes s. 15, or whether a buyer is entitled to rely on both. At common law, before 1920, he could so plead, but now there are two separate actions.

Under the present law, whether the sale is by sample or by description, the onus is still on the plaintiff to prove that the goods were not of merchantable quality when delivered by the seller.

Even if the trial judge was justified in giving judgment for the plaintiff, his computation of damages was wrong. No evidence was given as to the salvage value of these cases.

*G. W. Ford*, for the plaintiff, respondent: Counsel for the defendant seeks to place the onus on us not only to show that the goods were not of merchantable quality but also to track down the cause of the defect. [ROBERTSON C.J.O.: The appellant makes two contentions: (1) that the articles manufactured by it were not complete, since the bases were to be added by someone else; and (2) that the articles came to you in good order and, they having been in your possession and that of Smith, on your behalf, there is some burden on you to show that nothing you did could have caused the damage.] We rely on s. 15 of the Act, and where the defect is latent all we are required to do is to show the deterioration. If the appellant's argument were correct, the buyer's protection would be destroyed, since he would have to show not only the deterioration but also the cause of that deterioration, even in a case where the seller knew of the purpose for which the goods were bought and there was a latent defect. There are many cases where this would be

quite impossible. If the appellant's argument prevails, s. 15 becomes a nullity, and it must be read as saying that where the defect is latent there is no implied warranty unless the buyer identifies the specific defect.

The question of onus is the central one in this case. The *Grodwards* case, *supra*, is not authority for the contention made by the appellant. We must show that the goods were unfit for the purpose for which they were intended and, since we handled them, that there was no apparent fault on our part to cause the deterioration. Once we have done that, the onus shifts to the seller.

The design submitted was not a design with specifications, but a mere artist's sketch. The law is clear that the exhibition of a specimen does not necessarily, or even usually, make the contract one for sale by sample: *Gardiner v. Gray* (1815), 4 Camp. 144, 171 E.R. 46; *Dominion Paper Box Co. Limited v. Crown Tailoring Co. Limited* (1918), 42 O.L.R. 249 at 254, 43 D.L.R. 557. At the most, the sale would be one by description and sample. The seller is not liable in the case of apparent defects, and the question is accordingly of little importance here.

We have suggested some things which might have caused the deterioration, but we are not required to establish the cause specifically. We handled the cases in accordance with good business practice, and there was nothing more for us to show. *Jones v. Bright et al.* (1829), 5 Bing. 533 at 546, 130 E.R. 1167, although it is an old case, is still good law.

*G. W. Mason, K.C.*, in reply.

*Cur. adv. vult.*

24th January 1949. The judgment of the Court was delivered by

AYLESWORTH J.A.:—This is an appeal from the judgment of Mr. Justice Kelly pronounced on the 23rd July 1948, awarding plaintiff damages for breach of warranty in the sum of \$9,051.96, together with costs of the action.

The action arose out of the sale by defendant to plaintiff of five hundred plexiglass display cases at \$13 each. These comprised a top and four sides of plexiglass joined together and designed to fit over a flat, velvet-covered plywood base and to

rest on a flat wooden base to which the plywood was attached, the whole, together with a cardboard plaque, to be used as display units for displaying sets of plaintiff's silverware in jewellery stores throughout Canada.

The plastic cases as manufactured by defendant were to be shipped to J. Anderson Smith at Newcastle, Ontario. The defendant did this. Smith made the bases, assembled the cases and bases, packed the units and shipped them to plaintiff's warehouse at Niagara Falls. Twenty-three of the five hundred cases shipped to Smith were found to be defective on arrival; no bases were made for these. Four hundred and twenty-seven of the balance of four hundred and seventy-seven were assembled with bases, packed and forwarded to the plaintiff, the remaining fifty after such assembly and packing being retained at Smith's by reason of lack of storage space at plaintiff's warehouse. The defendant's deliveries commenced in March 1946 and were completed early in the following June and payment was made to the defendant as its invoices were received.

In the following August Mr. Johnson of the plaintiff company observed that the display unit on his office desk (presumably the sample made and assembled before the contract was entered into) had a slightly uneven or warped base. He ordered a spot check of the four hundred and twenty-seven units which were stored, still packed in their cartons, at Niagara Falls. This spot check, taken in September 1946, of fifteen of the units, revealed that three had broken tops and one a slightly warped base. The entire four hundred and twenty-seven units were then returned to Smith in November 1946 for a complete inspection thereof and of the fifty which he himself had stored in his own premises. The ensuing inspection by Smith revealed that two hundred and eleven of the plastic cases were cracked or broken and completely unsuitable for use. Sixty-five of the bases had warped slightly and these were replaced and those of the cases apparently in good condition were returned with their new bases to Niagara Falls. The two hundred and eleven defective cases were returned to the defendant. In January 1947 a few cases were shipped to Quebec and to British Columbia for use as originally intended. These also were found to be defective on arrival and plaintiff had them returned to Niagara Falls and ordered



another inspection of all of the remaining cases. This inspection, which took place in March 1947, disclosed that the entire balance of the plastic cases, with the exception of sixty-five, had deteriorated by breaking and cracking and were completely unusable. Communication between plaintiff and defendant resulted in May 1947 in a denial by the defendant of liability. The action was instituted in June 1947. In October 1947 a further inspection was made by the plaintiff of the remaining, apparently sound, sixty-five cases and that inspection revealed that by that date twenty-four more of the cases had similarly deteriorated and become unusable. A further inspection in March 1948 showed that of the entire original order, only ten plastic cases were in good condition.

Bernard Cohen was the president and general manager and his brother, Max Cohen, was the secretary-treasurer of the defendant. The former was the technical man in the company. It was he who had chiefly to do with the plaintiff in negotiations for the contract, and he alone of the employees or officials of the defendant gave evidence at the trial. From his evidence it is clear that the following important matters are not in dispute: In the negotiations leading to the contract defendant had represented to plaintiff that defendant was in the business of making plastic displays and was expert in that field; defendant was fully aware of the particular purpose for which the plastic cases were to be used, that they were to be fitted over wooden bases and were intended as more or less permanent display units; there were no apparent defects in the sample plastic case made up by the defendant by hand and submitted to the plaintiff before execution of the contract; plaintiff was relying upon defendant's skill and judgment to make cases that would be merchantable and fit for the use intended; the plastic cases which had cracked or broken were completely unsuitable for the purpose for which they were intended and were of no use except as scrap.

It is clear, I think, that this contract is one to which s. 15(a) and (b) of The Sale of Goods Act, R.S.O. 1937, c. 180, applies. Some suggestion, not vigorously pressed, was made at the hearing of the appeal that this was in fact a contract for sale by

sample, but upon the evidence I cannot find any term in the contract, express or implied, to that effect. The goods, then, were warranted by the defendant to be reasonably fit for the purpose for which they were intended and to be of merchantable quality. These warranties are absolute: Benjamin on Sale, 7th ed. 1931, pp. 655 *et seq.* What then must the plaintiff establish in order successfully to invoke them? The opinion of the learned trial judge upon this point is expressed in the following passage taken from his reasons for judgment:

"It was argued that the onus rested upon the plaintiff to segregate the cause of the failure and to establish in what respect the plexiglass top failed. With this contention I do not agree and am of the opinion that the plaintiff is only called upon to establish that the plexiglass tops failed in some respects and that such failure did not result from the fitting of the wooden bases or the inherent properties of the wooden bases."

With respect, I think this is too narrow a statement of the principle. I think that while the plaintiff is not required to prove the cause of the defect, it nevertheless must prove that the defect, latent or patent, existed when the goods were delivered by the defendant. This, I think, is the effect of such cases as *Randall v. Newson* (1877), 2 Q.B.D. 102, and *Wallis v. Russell*, [1902] 2 I.R. 585. In my view, the plaintiff has met that requirement in this case.

In its statement of defence, the defendant contents itself as to this branch of the case with a denial of the existence of any defects. In its correspondence with the plaintiff, it simply says that the cases were broken "through no fault of ours". At the trial, however, the defendant advanced two causes for the deterioration, namely, that in most instances the breakage or damage was attributable to warping and expansion of the wooden bases with a corresponding strain upon the plexiglass, and that in some instances the breakage was due to rough handling by someone other than the defendant. The learned trial judge expressly finds against the first of these contentions and refers, with apparent approval, to some of the evidence in refutation of the second one. Upon the whole of the evidence, and giving due weight to the learned trial judge's views as to credibility, to be gathered

from his findings, I think the appeal in its main aspects fails and must be dismissed.

In the argument, much stress was laid upon the fact that of the twenty-three cases originally set aside by Smith as unsuitable (and which accordingly were not assembled with any bases at all) only seven were found to be broken or cracked in any way, the remainder being unsuitable only by reason of other defects. This argument is based upon the evidence of one Meadows, whose evidence I have read with particular care. While I think his evidence is quite capable of a construction substantially different from and adverse to that contended for by the appellant, I am also of the opinion that the point is really not material to the decision of the case. The deterioration in each of the plexiglass tops was not in all respects of the same nature or degree, and ten cases out of the five hundred, for all that appears, are still in the plaintiff's warehouse in good condition. Moreover, the trial judge has found, upon ample evidence to support the finding, that none of the deterioration in any of the plexiglass tops was caused by warping or expansion of their bases.

The defendant also attacks the quantum of damages and in particular the sum of \$500 awarded for general damages. The only evidence adduced in support of the claim in this regard was that of the plaintiff's sales manager. He frankly admitted that the general damages were "very nominal" and, when pressed for details of such damage, really was unable, in my view, to establish any basis for any award whatsoever under this head.

The appellant also complains that the amount awarded for special damages included not only the contract price and sales tax payable with respect to the plexiglass tops, but also the cost incurred by the plaintiff for the bases, the velvet covering for the bases, and the cardboard plaques. The evidence is clear that the sole purpose for which the above-mentioned items were gathered together was for display in jewellery stores generally throughout Canada as an innovation, so far as plaintiff was concerned, in a general sales campaign. Bearing this in mind, I think the evidence supports in full the award as to special damages, and this ought not to be disturbed.



I would accordingly vary the judgment below by a reduction in the sum of \$500 from the total damages awarded. With this variation, I would dismiss the appeal with costs.

*Appeal dismissed with costs, subject to a variation.*

*Solicitors for the plaintiff, respondent: Sedgwick, Manley & Ford, Toronto.*

*Solicitor for the defendant, appellant: A. H. Friedgut, Toronto.*

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[WELLS J.]

[COURT OF APPEAL.]

**The City of Toronto v. British American Oil Company Limited  
Imperial Oil Limited (Third Party).**

**Toronto Harbour Commissioners v. British American Oil  
Company Limited  
Imperial Oil Limited (Third Party).**

*Pleadings—Admissions—Effect of Failure to Admit Facts contained in  
Pleading of Opposite Party—Striking Out—Costs—Rules 137, 141,  
142, 144, 671.*

Not every pleading which offends against the Rules of Practice will be struck out. The power to strike out a pleading should not be exercised to enable one party to dictate to the other how he should plead, and the applicant, to obtain an order, must show that he is in some way prejudiced or embarrassed by the pleading, or that a fair trial will be delayed by the irregularity. *Rolfe v. MacLaren* (1876), 3 Ch. D. 106 at 108; *Richard v. Hall* (1928), 62 O.L.R. 212 at 215, applied. The Court of Appeal will seldom interfere with the decision of a judge in chambers on an application to strike out a pleading unless some question of principle is involved or serious injustice will result. *Golding v. The Wharton Saltworks Company* (1876), 1 Q.B.D. 374, applied.

There is no Rule in Ontario, as there is in England, requiring a party to deal specifically with every allegation in the pleading of the opposite party of which he does not admit the truth. On the contrary, the Ontario Rules recognize the right of a party to remain silent as to any allegation, the result of which is that the fact is put in issue and, if it is material, must be proved at the trial. The mere fact that the opposite party will thus be put to additional difficulty and expense in proving its case is not a ground for striking out the pleading.

Per HENDERSON and HOGG J.J.A.: Due regard must be had for the fact that Rule 671 specifically provides a penalty for neglect or refusal to observe the terms of Rule 142 as to admissions. There are cases where the admission of a material allegation made by the plaintiff may be against the interest of the defendant, and may prejudice his defence, and it is often most difficult to decide, at least before trial, what admissions should be made. If it appears at the trial that some of the plaintiff's allegations should have been admitted by the defendant, and that such admissions could not have prejudiced in any way the defence set up at the trial, the provisions of Rule 671 can be invoked, and the defendant may be penalized in costs. *Merriman v. Diamond* (1922), 52 O.L.R. 354; *Fairbairn v. Sage* (1924), 56 O.L.R. 462, and other authorities, considered.

AN APPEAL by the defendant from an order of Wells J. in chambers. The following statement of facts is taken from the reasons for judgment of LAIDLAW J.A.:

"The Senior Master made an order dated the 28th October 1948, that the statement of defence of the third party in two separate actions involving the same issues be struck out. An appeal from that order to Mr. Justice Wells in chambers was allowed by an order dated the 26th November 1948, and the defendant now appeals from that order to this Court by leave granted by Mr. Justice Urquhart.

"The plaintiffs in the two separate actions claim damages sustained by them on the 8th January 1944, to bridges owned by them and crossing the Don River. They base their claims on alleged breaches of duty arising out of the storage of gasoline and/or oil and other inflammable substances on lands owned by the defendant or in its possession. The statements of claim contain allegations that gasoline and/or oil escaped from the lands and works of the defendant on to adjacent lands and into the Don River and that such gasoline and/or oil ignited, causing damage to the bridges. It was also alleged that the defendant was guilty of negligence, and particulars of such negligence are set forth in the pleadings. The plaintiffs also claim indemnity under the provisions contained in certain agreements, leases and conveyances between the respective plaintiffs and the defendant.

"In its statements of defence (as amended by order of the Master dated 4th October 1946) the defendant admits the truth of certain allegations and specifically denies other allegations in the plaintiff's statement of claim. The pleading contains statements of facts relied upon by the defendant, and it is pleaded, *inter alia*, that if in fact gasoline and/or oil was present on lands adjacent to those owned or leased by the defendant and also in the Don River and Keating Channel, the same escaped from lands, premises or pipe lines owned or occupied by Imperial Oil Limited. It is further pleaded that 'if at the trial of the action it should be found that the defendant was negligent and that such negligence contributed to the damage suffered by the plaintiff, Imperial Oil Limited was also negligent and . . . its negligence also contributed to such damage and the defendant in such event claims contribution from Imperial Oil Limited. The defendant in any event pleads the Negligence Act, R.S.O. 1937, ch. 115, ss. 1, 2(1), 3, 4, 5, 6 and 7 and amendments thereto.'

"The defendant in its statement of claim against the third party in each action alleges (in para. 3 thereof) that: 'The third party is a corporation carrying on business similar to that of the defendant and on the 8th day of January, 1944, and for some time prior thereto maintained and still maintains storage tanks, pipe lines and other equipment, necessary for the carrying on of such business, upon lands and premises adjacent to or in the vicinity of the said lands of the defendant and of the said bridge.' Para. 4 contains a statement as to the claim for damage made by the



plaintiff and the allegation made by the plaintiff that the defendant stored highly volatile gas or oil in its storage tanks and negligently allowed the same to escape therefrom and accumulate in the Don River. Para. 5 refers to the plea of the defendant in its statements of defence that if in fact gasoline and/or oil or other petroleum products were escaping on to the lands and properties adjacent to the lands of the defendant and on to the Don River and were accumulating therein the same were escaping from the lands or properties owned or occupied by Imperial Oil Limited and not from the lands or property occupied by the defendant, and the further plea of contributory negligence on the part of Imperial Oil Limited. In para. 6 the defendant repeats the allegations respecting the third party's negligence and makes a claim for contribution and indemnity from the third party in respect of any liability imposed upon the defendant for negligence and expressly pleads The Negligence Act, R.S.O. 1937, c. 115, ss. 1, 2(1), 3, 4, 5, 6 and 7. Particulars of the third party's negligence are thereafter set forth at length. Para. (a) thereof was referred to by counsel on the argument and is as follows:

“(a) The third party stored on its said premises in vicinity of the said bridge structure and piped across the said Don River above the said bridge structure highly volatile gasoline and/or oil without taking any precautions or sufficient precautions to prevent its escape.’

“The statement of defence of the third party in each action was struck out on two occasions, and the one presently under consideration was delivered pursuant to an order of the Court dated the 30th June 1947. In para. 1 thereof, the third party expressly admits certain allegations contained in the pleadings of the defendant and admits ‘that the Third Party is a corporation and carries on business in Toronto, dealing in gas and oil’. In para. 2: ‘The Third Party says that at all material times no gasoline and/or oil was escaping from its lands and properties on to the Don River: that it was not negligent in any way: that it did not contribute to the damage claimed by the plaintiff: that it neither knew or ought to have known that its gasoline and/or oil was escaping into the Don River and igniting because the latter allegation is not true: that it neither permitted its equipment to remain in disrepair or permit gas or oil to escape therefrom: that its plant, tanks, pipe lines and system were constructed

and maintained properly and with due care.' In para. 3: 'The Third Party says that it did not contribute to the plaintiff's damage by any of the wrongful acts alleged by the defendant in paragraph 6 of its Statement of Claim: and that it did not, in fact, do any of the said wrongful acts: and puts the defendant to the proof thereof.' In para. 4 of its pleading, the third party says: 'that even assuming all the defendant's and all the plaintiff's allegations of fact to be true, they are not sufficient in point of law to sustain the action or claim of the defendant to contribution or indemnity from the third party.' "

The reasons for the order appealed from were as follows:

26th November 1948. WELLS J. [after summarizing the pleadings]:—The pleading objected to, which was struck out by the learned Senior Master, is the third statement of defence delivered by the third party, the two previous statements of defence having been struck out as not complying with the Rules of Practice, and particularly Rule 142. The present statements of defence are admittedly somewhat more ample than those which preceded them, but, as appears from his reasons for judgment, the learned Senior Master was not satisfied that they were in compliance with Rule 142 and accordingly made an order in each action striking out the statement of defence last delivered.

Most of the decisions relating to the interpretation of Rule 142 deal with the latter part of the Rule, that is, that portion of it which states that a defendant shall not deny generally the allegations contained in the statement of claim but shall set forth the facts upon which he relies even though this may involve the assertion of a negative. Apart from one or two authorities, to which I shall presently refer, there is very little judicial expression of opinion on the first part of the Rule, which states that each party shall admit such of the material allegations contained in the pleading of the opposite party as are true. It may, of course, be that these words are so plain and simple that very little judicial exposition of them has been needed. The Rule in its present form goes back to 1913, when substantial amendments were made to its predecessor, Rule 269. However, the provision in regard to the admission by the opposite party of such of the material allegations as are true would appear to be common both to Rule 142 and its predecessor, Rule 269.

As was said by Riddell J. in *Adams v. Toronto Transportation Commission* (1923), 24 O.W.N. 157: "The object of the Rule is to have it definitely clear upon the pleadings what the issues are which are to be tried—if the defendant is not to dispute any material allegation, he should say so, and not lay a trap for the plaintiff under the provisions of Rule 144."

Rule 144, of course, simply provides that: "Save as otherwise provided, the silence of a pleading as to any allegation contained in the previous pleading of the opposite party shall not be construed as an admission of the truth of such allegation."

In his reasons for judgment the learned Senior Master dealt with two aspects of the statements of defence. The first was in respect of the admissions made by the third party, which admissions had apparently been lacking in the statements previously struck out. His comments on these admissions were that: "The third party has admitted only allegations that are manifest from the pleadings and the averment as to its status. This falls far short of compliance with Rule 142 and borders on the trivial."

The point that was argued before me was that in its claim against the third party the defendant alleged that the third party carried on business similar to that of the defendant and on the 8th January 1944, and for some time prior thereto, maintained, and still maintained at the time of the pleading, storage tanks, pipe-lines and other equipment necessary for the carrying-on of such business upon the lands and premises adjacent to or in the vicinity of the lands of the defendant and of the bridge structure. It was said that these facts were true and material and that the third party under the Rule was obliged to admit them. This was evidently the view held by the learned Senior Master.

"Material fact" has been defined as a fact which is essential to the plaintiff's cause of action or to the defendant's defence: see Odgers, *Pleading and Practice*, 11th ed. 1934, pp. 84, 97. The allegations would I think come within the word "material" as so defined.

But as I have said, there is very little authority dealing with the liability to make admissions under the Rule. Reference is sometimes made to the dictum of Malins V.C. in *Lee Conservancy Board v. Button* (1878-9), 12 Ch. D. 383, in commenting on the nature of the statement of defence required by the then new Judicature Act. He said at p. 397, in respect of the answer



required before The Judicature Act: "The proper province of an answer was to simplify litigation as much as possible, and therefore the Defendant was always considered to act properly in admitting those facts which he could not deny, and it was to the interest of both parties that it should be so, because by admitting those facts which it was neither to his interest nor in his power to deny, it simplified the proof."

Malins V.C. was very obviously of the opinion that the same considerations applied to a statement of defence. However, there is nothing to indicate that he considered such a practice entirely binding in all respects or to the extent evidently considered desirable by the learned Senior Master in this case.

The matter appears to have been dealt with in Ontario by Kerwin J. in the case of *McChesney et al. v. Lichtman et al.*, [1933] O.W.N. 737. The allegations made by the plaintiff in para. 2 of the statement of claim in that case were as to the status of certain of the defendants and the ownership of a motor vehicle which had been involved in an automobile accident which was the occasion of the action. The point in issue was precisely the point in respect of the admissions sought here. The plaintiffs contended in that case that the defendants must state whether they affirmed or denied that one defendant was the executor of the estate which owned the motor vehicle, and that the other defendant was driving the car in question, and that the car was in fact owned by the estate named. At p. 738 Mr. Justice Kerwin stated:

"There is no doubt, of course, that a defendant may not deny 'generally the allegations contained in the statement of claim' (Rule 142), and the defendants are not entitled to file an evasive pleading: *Merriman v. Diamond* (1922), 52 O.L.R. 354 [[1923] 3 D.L.R. 1091], *Adams v. Toronto Transportation Commission* (1923), 24 O.W.N. 157. But the Rules do not demand that a defendant must deal specifically with each allegation of fact of which he does not admit the truth. This is what is required by the English Rules, which also provide that failure to deny an allegation of fact constitutes an admission of the truth, while our Rule 144 provides that the silence of a pleading as to any allegation contained in the previous pleading of the opposite party shall not be construed as an admission of the truth of such allegation. It is only where the defendant pleads to the allegations

that the plaintiff is entitled to a statement of the facts alleged by the defendant in answer to the plaintiff.

"If costs are incurred by reason of a party's neglect or refusal to admit something which ought to be admitted, the party at fault may be penalized under Rule 671; but the learned Justice said that he could not find any authority to grant the order asked by the plaintiffs in this case with reference to para. 2 of the statement of claim."

This judgment was subsequently followed in an unreported decision of Barlow J., who was then Master, in the case of *Hrehoreti v. King-Victoria Limited*, a copy of which has been furnished me by counsel. In that case one of the complaints was that the statement of defence did not admit such of the material allegations contained in the statement of claim as were true. No admissions of any sort appear to have been made, and in giving judgment the then Master stated:

"Under our practice the defendant is not compelled to admit or deny the plaintiff's allegations. After a careful reading of the statement of defence, I am of the opinion that it is not a general denial such as was dealt with in the cases of *Richard v. Hall*, 62 O.L.R. 212 [[1928] 3 D.L.R. 189], *Adams v. Toronto Transportation Commission*, 24 O.W.N. 157, *Appliances v. Smith*, [*infra*], and other cases cited by counsel for the plaintiff.

"As I am of the opinion that the pleadings in this case follow the pleadings in the case of *McChesney v. Litchman* [*supra*], and as I am of the further opinion that the statement of defence as delivered complies with the rules of pleading, an order will go dismissing the plaintiff's motion."

I was advised that an appeal was taken from this order to Gillanders J. in chambers, and that on 27th June 1941, the appeal was dismissed and the Master's judgment was upheld, with costs to the defendant in any event. The Registrar has looked up his notes of this appeal and confirms the statement of what occurred.

A somewhat similar opinion is expressed in the judgment of Masten J. some years earlier in *Appliances Limited v. Smith Denne & Moore Limited* (1921), 20 O.W.N. 443. This was an application dealt with in chambers, and in discussing the effect of Rule 142 Masten J. said, at p. 444:

"A plaintiff is entitled to have it stated with precision what issues the defendant raises and what are the facts, as distin-

guished from the evidence, on which he relies to maintain the issues so raised. This is emphasized by Rule 143.

"The Rules do not say that the defendant shall either deny or admit every allegation, material or immaterial, in the statement of claim: indeed, the contrary is to be inferred from Rule 144."

Under these circumstances, while there is a great deal of side opinion, as it were, in the various cases dealing with the question of general denial which might indicate that a defendant should admit any material facts alleged against him which are in fact true, I am, as I apprehend it, bound by the decision of Kerwin J. and the subsequent decision of Barlow J. when Master, which was confirmed on appeal. As Mr. Justice Kerwin said in the case already cited: "It is only where the defendant pleads to the allegations that the plaintiff is entitled to a statement of the facts alleged by the defendant in answer to the plaintiff."

Looking at the matter apart from authority, I cannot see that the present statement of defence, in so far as the admissions are concerned, constitutes an evasion by the third party of the defendant's claim against it or lays a trap for the defendant. By the operation of Rule 144 the material facts which are not admitted must, in the normal course of events, be proved by the defendant against the third party, and the defendant is now aware of that fact. As I see it, there is no obligation on the third party to make out the defendant's case for it as against itself. That burden rests on the defendant, which is claiming.

I am told that this is the sixth application made in respect of these statements of defence and that in each case previously the statements of defence were struck out, and on appeal the Master was sustained, and that leave to appeal was refused. Be that as it may, I am not dealing with the other statements of defence filed by the third party, I am dealing with the present pleading only. As I see it, the question earlier really turned on the generality and sufficiency of the denials made by the third party in respect of the specific allegations of negligence laid against it by the defendant.

In the present case the learned Senior Master found the wording of the defence, apart from the paragraph containing the admissions, just as objectionable as previously, and for the same reasons. I gather from the Master's previous judgment, on which



he relies in the judgment under appeal, and which is reported in [1948] O.W.N. 693, that the objection of the learned Senior Master is that the present pleading merely repeats specifically the general denials to which he objected in the earlier versions of the same document. In other words, in his view, the vice of the previous pleading is continued in the one under review. With great respect to the Senior Master, if the allegations set forth in the claim of the defendant against the third party are considered they are not such as permit any elaborate statement of facts in rebuttal. The allegations of the defendant are substantially to the effect that gasoline and oil escaped from the equipment of the third party and materially caused or contributed to the fire which is the real subject matter of the action. If the third party chooses to say in defence that none of its gasoline or oil escaped and that it was not careless or negligent and that its equipment was not faulty, it is a little difficult to see what more can be said. It is quite true that more words might be used to say it, but it is somewhat doubtful to me whether they would have any different effect from the concise and simple statement employed by the third party.

As Mr. Justice Orde said in the case of *Merriman v. Diamond*, 52 O.L.R. 354 at 356, [1923] 3 D.L.R. 1091: "When one is charged with having done something which he has not done, the only allegation of fact which he can plead is that he did not do it."

The whole question of general denial as prohibited by Rule 142 is thoroughly dealt with by Mr. Justice Orde in that judgment. It would seem to me, with great respect to the learned Senior Master, that the claim of the defendant against the third party in this case is itself in the most general and indefinite terms, and that some attention must be paid to the form the defendant's claim takes in considering how specific and factual the reply of the third party can be. As I see it, since the third party takes the position that the fire in question was not caused by the escape of any of its gasoline or oil or by its lack of care, there is very little more that it can set up by way of defence than what it has actually pleaded. There is in no sense an evasion of a claim against it, as found by Orde J. in *Merriman v. Diamond*; and the issues between the defendant and the third party are defined with reasonable clearness. The third party has in fact answered the points of substance raised against it by the defendant.

In this connection, I think it is worthwhile to quote the remarks of Orde J. concerning Rule 142, at pp. 356-7 of the report already cited, as follows:

"The Rule was discussed and applied by Masten, J., in *Appliances Limited v. Smith Denne & Moore Limited* (1921), 20 O.W.N. 443. The English Rules on this question differ from ours in some respects, as pointed out by Masten, J., but there are many points of resemblance which are of assistance. The English Rule which corresponds to Rule 142 is Rule 213, which provides that 'it shall not be sufficient for a defendant, in his defence, to deny generally the grounds alleged by the statement of claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages.'

"And there are several English Rules which more clearly define what is intended by the requirement that 'each party must deal specifically with each allegation of fact' of his opponent. While some of the provisions of these other Rules are covered in effect by some of ours, there is very little direct correspondence between them, and the English Rule 209, under which failure to deny an allegation of fact constitutes an admission of the truth, is quite contrary to our Rule 144, by which silence as to an allegation in a previous pleading of the opposite party is not to be construed as an admission. The difference in our practice in this respect tends to minimise the effect of our Rule 142. If the English Rule 209 were in force in Ontario, our Rule 142 would be much more rigidly observed than it is in actual practice.

"But our Rule 142, like the English Rule 213, is designed substantially to prevent the same thing, namely, pleading what was called 'the general issue', such as 'never indebted' or 'not guilty,' under which pleas the defendant at the trial could rely upon a large number of defences: *Annual Practice*, 1922, p. 347; *Ogders on Pleading*, 8th ed., p. 88.

"Counsel for the plaintiff contended that in answering the allegations of the plaintiff as to the defendant's alleged false and fraudulent statements, it was incumbent upon the defendant to set forth the statements which the defendant is willing to admit or asserts that he did in fact make. But this must depend upon the nature of the defence which the defendant intends to make out at the trial. The burden of proof in an action of deceit is upon the plaintiff, and as a matter of pleading the defendant

may make out a sufficient defence if he denies the allegations of the plaintiff in accordance with the Rules. He must not deny generally, which means that, if he denies, his denial must be specific. The real vice of para. 2 is not so much that the denial is of a general character, but that it is evasive. The English Rule 215, which expressly requires that a party shall not deny an allegation of the opposite party evasively, but shall answer the point of substance, is not reproduced in our Rules, but I think that the provisions of our Rule 142 really cover the same ground. Apart altogether from the effect of our Rule 137, under which an evasive pleading may be struck out as embarrassing, I think that the inability to deny generally, coupled with the requirement to set forth the facts upon which he relies, under Rule 142, in effect requires the defendant, if he answers the allegations, not to do so evasively, but to answer the point of substance."

I may say that the pleadings which were objected to, and which were finally approved in the Appellate Division, in the case of *Merriman v. Diamond*, were produced for my inspection. While they are much more wordy than the present statement of defence I am not able to distinguish the type of denial there approved in principle from the one employed by the third party here. In looking at the whole matter, I am driven to the conclusion that in effect by means of this statement of defence the issues between the defendant and the third party are stated with sufficient precision.

Ferguson J.A. said, in the Appellate Division, in the case of *Fairbairn v. Sage*, 56 O.L.R. 462 at 469-70, [1925] 2 D.L.R. 536: "Considering the wording of these Rules and the purpose of the Rules of Practice, I am of opinion that Rules 141 and 142 should not be interpreted as inflexible rules of law or practice, but that a pleading which does not comply with the requirements of these Rules is to be regarded as an irregular proceeding rather than as a nullity." And later, at p. 470, in deciding that a pleading should not be struck out, although not in literal compliance with the Rule, he said: "That such course may be adopted is, I think, established by the judgment of this Divisional Court in *Merriman v. Diamond* (1922), 52 O.L.R. 354, at p. 361 [[1923] 3 D.L.R. 1091], affirming an order of Lennox, J., refusing to strike out a pleading because it did not comply with Rule 142."



If the pleading under review is irregular, then it should not necessarily be struck out if the intent and purpose of the Rule has in fact been met by the form it takes. However, I do not so regard the pleading under review. In the view I take, there is sufficient and substantial compliance with Rule 142 by the statement of defence under consideration.

In the result, therefore, the appeal from the learned Senior Master will be allowed and the application of the defendant as against the third party in each action will be dismissed with costs to the third party in the cause.

*Order accordingly.*

18th January 1949. The appeal was heard by HENDERSON, LAIDLAW and HOGG J.J.A.

*A. C. Heighington, K.C.*, for the defendant, appellant: There have been seven judgments in this matter, each dealing with a statement of defence of the third party. Earlier reasons for judgment in the same matter are to be found in [1947] O.W.N. 614 and [1948] O.W.N. 693. The statement of defence now before the Court is the third that has been filed. In each there has been merely a general denial, and no admissions have been made, as required by Rule 142. Rule 144 is also in point here, and its effect has been misconceived by the third party: *Adams v. Toronto Transportation Commission* (1923), 24 O.W.N. 157. The pleading is none the less a general denial because it is subdivided into specific denials of each allegation in our pleading. *Merriman v. Diamond*, 52 O.L.R. 354, [1923] 3 D.L.R. 1091, has been misconstrued. The only point in that appeal was whether the defence should be struck out because of a failure to deliver particulars. It is discussed in *Richard v. Hall*, 62 O.L.R. 212, [1928] 3 D.L.R. 189.

The defence must not lead us into a trap. This pleading, being a general denial, is evasive: *McChesney et al. v. Lichtman et al.*, [1933] O.W.N. 737. [LAIDLAW J.A.: It might be highly prejudicial for the third party to admit that it stored a dangerous substance. Its counsel will presumably argue that The Negligence Act, R.S.O. 1937, c. 115, does not apply in this case.]

*T. N. Phelan, K.C.*, for the third party, respondent: The defendant is fully aware of all the issues, and the object of pleadings is only to define the issues. The plaintiff in each case

alleges loss due to the negligence of the defendant, and it claims damages, first, on the basis of that negligence, and secondly, on a contract. The defendant has alleged that we contributed to the accident, and it must prove that allegation: *Odgers on Pleading and Practice*, 11th ed. 1934; *Read v. J. Lyons & Company, Limited*, [1947] A.C. 156, [1946] 2 All E.R. 471.

We have maintained throughout that the provisions of The Negligence Act are limited to cases where two persons are jointly or severally liable to the plaintiff, and cannot apply here, where the plaintiffs have made no attempt to bring us in.

The Master has no right to say what we must admit. By our Rules anything which is not expressly admitted is put in issue. We must look at Rules 144 and 167. Barlow J., in his judgments on earlier applications in this case, has departed from his own previous decision, as Master, in *Hrehoreti v. King-Victoria Limited* (1941, unreported). That judgment, which I submit was correct, was based on *McChesney, et al. v. Lichtman, et al.*, *supra*. I refer also to *The Waterloo Mutual Insurance Company v. Robinson and Clark* (1883), 4 O.R. 295. The present Rule 142 is derived from Chancery Order 124: see Taylor's Chancery Orders, 3rd ed. 1868, p. 186. I refer also to *Seabrook v. Young* (1887), 7 C.L.T. 152; *Hydro-Electric Power Commission v. Fidelity Insurance Co. of Canada, et al.* (1936), 4 I.L.R. 307; *Sentinel-Review Co. Ltd. v. Robinson*, 61 O.L.R. 62 at 68, [1927] 4 D.L.R. 232.

As to the limit of the Master's jurisdiction on such an application, I rely on *Canada Starch Co. Ltd. v. St. Lawrence Starch Co. Ltd.*, [1936] O.R. 261 at 279, 65 C.C.C. 270, [1936] 2 D.L.R. 142; *Fairbairn v. Sage*, 56 O.L.R. 462 at 467, [1925] 2 D.L.R. 536.

*A. C. Heighington, K.C.*, in reply.

*Cur. adv. vult.*

8th February 1949. HENDERSON J.A. agrees with LAIDLAW and HOGG JJ.A.

LAIDLAW J.A. [after stating the facts as above]:—The objection taken by the defendant to the statements of defence of the third party is that they do not comply in form or substance with the requirements of Rules 141 and 142 of the Rules of Practice and Procedure. Those Rules are as follows:

"141. Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the

evidence by which they are to be proved; dates, sums and numbers shall be expressed in figures.

"142. Each party shall admit such of the material allegations contained in the pleading of the opposite party as are true, and a defendant shall not deny generally the allegations contained in the statement of claim but shall set forth the facts upon which he relies even though this may involve the assertion of a negative."

If a pleading is not drawn according to the Rules it may tend to prejudice, embarrass or delay the fair trial of the action, and in such case it may be struck out or amended as provided in Rule 137 as follows:

"137. Any pleading which may tend to prejudice, embarrass or delay the fair trial of the action may be struck out or amended."

Counsel for the defendant contends that the pleading of the third party offends against Rule 142 because it is merely a general denial of the allegations contained in the statement of claim of the defendant against the third party; that it does not set forth the facts upon which the third party relies; and, in particular, because the third party does not admit the truth of the following allegations contained in the pleading of the defendant:

1. "The third party is a corporation carrying on business similar to that of the defendant and on the 8th day of January, 1944, and for some time prior thereto maintained and still maintains storage tanks, pipe lines and other equipment, necessary for the carrying on of such business, upon lands and premises adjacent to or in the vicinity of the lands of the defendant and of the said bridge", as set forth in para. 3 of the statement of claim of the defendant against the third party.

2. "The third party stored on its said premises in vicinity of the said bridge structure and piped across the said Don River above the said bridge structure highly volatile gasolene and/or oil", as set forth in part of the particulars of the third party's negligence in para. 6(a) of the statement of claim.

It will perhaps be helpful first to state certain principles and conclusions touching the question in controversy. The purpose of pleadings is to define the issues between the parties. The parties have a right to raise such issues as their respective counsel may deem advisable. They may frame their cases in whatever way is deemed best, subject only to the limitation that the pleadings



must not offend against the Rules of Practice. That right is one that ought to be carefully preserved to the parties and should not be infringed by the Court: per Bowen L.J. in *Knowles v. Roberts* (1888), 38 Ch. D. 263 at 270. It is not every pleading which offends against the Rules that will be struck out. The applicant must show that he is in some way prejudiced or embarrassed or that a fair trial will be delayed by the irregularity. The power to strike out a pleading should not be exercised to enable one party to dictate to another how he should plead: *Rolfe v. Maclaren* (1876), 3 Ch. D. 106 at 108; *Richard v. Hall*, 62 O.L.R. 212 at 215, [1928] 3 D.L.R. 189, per Meredith C.J. Finally, it has been said with authority that the Court of Appeal will seldom interfere with the decision of a judge in chambers on an application to set aside a pleading unless some question of principle is involved or "where serious injustice would result" from not interfering: *Golding v. The Wharton Saltworks Company* (1876), 1 Q.B.D. 374.

I have referred above to decisions in the courts of England, but it is to be borne in mind that the English Rules in regard to admissions differ substantially from our Rules of Practice and Procedure. In England it is expressly provided by Rule 213 that "each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages". Rule 215 requires that a party in pleading must not evasively deny an allegation of fact in a previous pleading of an opposite party but must "answer the point of substance". The effect of those Rules is to compel a defendant to deal specifically with each allegation of fact which he does not admit to be true. He must deal with the substance of each allegation and must either deny it or state definitely that he does not admit it: see per Jessel M.R. in *Thorp v. Holdsworth* (1876), 3 Ch. D. 637. There is no such rule of practice in this Court. On the contrary, it is expressly recognized by our Rules that the pleading of a party may be silent as to any allegation contained in the previous pleading of the opposite party. Rule 144 provides that "Save as otherwise provided" such silence "shall not be construed as an admission of the truth of such allegation". The effect of that Rule is that if a party does not admit that an allegation in a previous pleading of an opposite party is true, he must be taken to have put such allegation in issue: *The Waterloo Mutual Insurance Company v. Robinson* (1883), 4 O.R. 295, referred to in *King v. Bailey* (1901), 31 S.C.R.

338 at 342. If such allegation be material, the party making it is thus, by silence in the pleading of the opposite party, put to the proof of the truth of it. Again, the right of a party who fails to make an admission or who refuses to do so is recognized by the provisions in Rule 671 whereby an order may be made for payment of the costs occasioned by such neglect or refusal.

The sole question for decision is whether or not the pleading of the third party tends to prejudice or embarrass the defendant or tends to delay the fair trial of the action. There is no evidence or reason of any kind to support the view that the pleading tends to prejudice the defendant. Counsel for the defendant emphasizes, however, that the pleading is embarrassing and tends to delay the fair trial of the action because in the absence of a specific admission of the truth of the material allegations, as insisted upon by him, he will be obliged to seek evidence to establish the truth of the allegations from officers or employees of the third party. It may be that the defendant will have to resort to that means of proof of allegations which counsel for it deems material in proof of its case against the third party, but that fact, and the trouble or difficulty occasioned by it, is not sufficient reason for finding that the pleading of the third party is embarrassing or will tend to delay the fair trial of the action. The plight of the defendant would be just the same if the third party specifically denied the allegations. To decide otherwise would be tantamount to recognition of a right of one party to dictate to the other how the latter must plead and frame his case. The Court cannot properly order a party to make an admission on the ground only that the opposite party ought to be relieved from the burden of proof of an allegation material to its case, or because the evidence to establish the proof of such allegation is available only from persons employed by the party whose pleading is attacked.

The third party was quite within its right in refusing or neglecting to admit or deny specifically the allegations which the plaintiff seeks to compel the third party to answer in express language. It was entitled, in respect of such allegations, to remain silent in its pleading. The pleading is not a general denial of the allegations contained in the statement of claim of the defendant against the third party, and sufficiently defines the issues between the defendant and the third party. The defendant has clear knowledge from the pleading of the issues to be tried

as between it and the third party. There will be no more delay in a fair trial than if the third party expressly denied the allegations in respect of which the defendant seeks an admission. I think there was no error in principle in the decision of Mr. Justice Wells and that no serious injustice will result to the defendant from the refusal of this Court to interfere with the order made by him.

Therefore, I would dismiss the appeal with costs.

HOGG J.A.:—I have had the privilege of reading the reasons for judgment written by my brother Laidlaw in which he has quoted Rules 137, 141 and 142 and has stated fully the facts as well as the issue in dispute between the defendant and the third party. I am in agreement with the conclusion reached, and the reasons given, by him.

The application and effect of Rule 142 when it is considered in connection with Rule 671 have given rise in the past to considerable discussion, and I think the subject is of sufficient importance to express my opinion thereon.

Rule 142 appears to be founded on the Old Chancery Order 124: Taylor's Chancery Orders, 3rd ed. 1868, p. 186.

In *Merriman v. Diamond*, 52 O.L.R. 354, [1923] 3 D.L.R. 1091, according to the headnote, the defendant's fault was not so much that the denial was of a general character as that it was evasive in that it was not clear whether he was asserting that he did not make any of the representations which the plaintiff alleged he did make or was asserting that the representations which he made were true. By para. 2 of the statement of defence in that case the defendant "denies that he, at any time, made any false and fraudulent representations of any kind to the plaintiff or was guilty of any fraud whatsoever as alleged in the statement of claim". Orde J. said that the real vice of para. 2 of the statement of defence was not so much that the denial was of a general character but that it was evasive and that Rule 142 required the defendant, if he answered the allegations, not to do so evasively but to answer the point of substance. But at p. 357, in referring to that part of the Rule which provides that each party shall admit such of the material allegations contained in the pleading of the opposite party as are true, the learned judge said:



"Counsel for the plaintiff contended that in answering the allegations of the plaintiff as to the defendant's alleged false and fraudulent statements, it was incumbent upon the defendant to set forth the statements which the defendant is willing to admit or asserts that he did in fact make. But this must depend upon the nature of the defence which the defendant intends to make out at the trial."

It is to this opinion of Orde J. that, I think, serious consideration must be given in its application to the present case. The admissions to be made by a defendant depend in large degree upon the defence which is to be made out at the trial.

In *Fairbairn v. Sage*, 56 O.L.R. 462, [1925] 2 D.L.R. 536, in the Appellate Division, Ferguson J.A. expressed the following opinion, at pp. 469-70: "Considering the wording of these Rules and the purpose of the Rules of Practice, I am of opinion that Rules 141 and 142 should not be interpreted as inflexible rules of law or practice, but that a pleading which does not comply with the requirements of these Rules is to be regarded as an irregular proceeding rather than as a nullity."

*Richard v. Hall*, 62 O.L.R. 212, [1928] 3 D.L.R. 189, was concerned with a statement of defence which, it was contended, was in contravention of Rule 142 and was embarrassing because it merely contained a general denial of the allegations set out in the statement of claim. Meredith C.J.C.P. said that "the pleading objected to could rightly be struck out only if it tended to prejudice, embarrass, or delay the fair trial of the action."

It was said by Malins V.C. in *Lee Conservancy Board v. Button* (1878-9), 12 Ch. D. 383, that a defendant ought not to deny the plain and acknowledged facts which it is neither in his interest nor in his power to disprove.

Rule 142 speaks only of material allegations in a pleading. There are cases where the admission of a material allegation made by the plaintiff might be against the interest of a defendant and might prejudice his defence, although ostensibly such allegation would seem to be true. There are cases with respect to which it would be most difficult to decide, at least prior to the trial, whether an admission should be made, and where it is not clear that such admission, if made, would not affect the defence adversely. Whether an admission should be made of a material allegation that is true would, I think, in some actions, depend upon

the character of the action and the nature of the defence and upon factors which would not become apparent until the trial of the action, when the theory of the defence would be developed.

In *Smith & Stone Limited v. Victoria Electric Supply Co. Limited* (1921), 20 O.W.N. 210, Orde J. said at p. 211: "The relevancy of the allegations in paras. 2 and 6 can be better dealt with at the trial, when all the evidence is in. This is the proper course where there is any doubt as to the right of a party to plead matters which are objected to: *Glass v. Grant* (1888), 12 P.R. 480; *Stratford Gas Co. v. Gordon* (1892), 14 P.R. 407; *Daley v. Byrne* (1892), 15 P.R. 4."

On the other hand, there are actions where it would be obvious that the admission by the defendant of an allegation made by the plaintiff, which is true, could not prejudice the defence and where the refusal to make such an admission would be indefensible.

The opening words of Rule 671 refer to the course of an action, and if in the course of the action—and this may well be, in some cases, at such time as the action has come to trial—it is found that certain allegations should have been admitted by a party who had neglected or refused to make such admissions, and it is clear that such admissions, if they had been made in the statement of defence, could not have prejudiced in any way the defence set up at the trial, the provisions of Rule 671 could be invoked and the penalty of costs against the defendant neglecting or refusing to make the admissions in his pleadings could be awarded to the opposite party.

It is true that the defendant in the present action might possibly be put to considerable effort and to some expense in order to be prepared to prove at the trial those allegations made in the statement of claim which it considers should have been admitted by the statement of defence of the third party. If, during the trial, it is found these allegations could have been admitted by the third party in its pleadings, to the extent and degree claimed by the defendant, without harm or prejudice to its defence, the situation would then arise which is contemplated by the provisions of Rule 671 and the third party could be made to suffer the penalty of costs. I think due regard must be had to the fact that a penalty for the neglect or refusal to observe the terms of Rule 142 is specifically provided by Rule 671.

In the recent case of *Donovan v. The Toronto Transportation Commission et al.*, [1948] O.W.N. 853, the Senior Master had struck out a paragraph of the statement of defence on the ground that it did not comply with the provisions of Rule 142. Mr. Justice Kelly, upon an appeal from the order of the Master, restored the paragraph of the defence which had been struck out, and referred to the fact that if a material fact was not admitted the party who failed to make such admission might be penalized under Rule 671.

Under Rule 137 any pleading may be struck out which tends to prejudice, embarrass or delay the fair trial of an action, and a pleading not drawn according to the Rules may be embarrassing, but Rule 671 provides a special and distinct penalty, confined to the case where anything in the course of an action has not been admitted which ought to have been admitted. It is said in *Holmsted*, Ontario Judicature Act, 4th ed. 1915, p. 575, that as a general rule a pleading should not be set aside on a summary application unless plainly frivolous or indefensible, and in *Rolfe v. Maclaren* (1876), 3 Ch. D. 106, it was said that the power to strike out a pleading should not be exercised so as to enable one party to dictate to another how he should plead. See also *Duryea v. Kaufman* (1910), 21 O.L.R. 161, per Riddell J. at p. 168.

The statement of defence of the third party in the present action cannot be held, in my view, to be frivolous or be said to be plainly indefensible; neither has it been established that it would prejudice or hinder the fair trial of the action. I think that the present action is one of those cases where the complaint of the defendant with regard to the pleading of the third party is a matter that cannot be dealt with satisfactorily until the trial of the action is proceeded with, when the trial judge may deal with the question according to the terms of Rule 671, if it then appears that the third party should have made the admissions in its pleadings that it is now called upon by the defendant to make.

I think the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the defendant, appellant: Symons, Heighington & Symons, Toronto.*

*Solicitors for the third party, respondent: Phelan O'Brien & Phelan, Toronto.*



[COURT OF APPEAL.]

Hanley v. Hanley et al.

*Divorce and Matrimonial Causes—Alimony and Maintenance—Security by Husband—Discretion of Court—Security on Contingent Interest—Distinction between ss. 1 and 2 of The Matrimonial Causes Act, R.S.O. 1937, c. 208.*

Since an order under s. 1 of The Matrimonial Causes Act, requiring a husband to secure a gross or annual sum to his wife, is final and, unlike an order for the payment of maintenance under s. 2, is not subject to variation in the event of a change of circumstances, the Court is not limited, in its consideration of "the ability of the husband", to present ability. It is entitled to, and should, take into consideration future ability which it can reasonably measure by a reference to assets available by way of security. It follows that a husband may be ordered to give security on a contingent interest, provided it is possible to estimate the earning power of that interest at the time when the husband will become entitled to it. *Shearn v. Shearn*, [1931] P. 1 at 5, 7, not followed; *Harrison v. Harrison* (1887), 12 P.D. 130 at 133, referred to.

Judgment of Wells J., [1948] O.R. 827, affirmed.

AN APPEAL by the defendant from that part of the judgment of Wells J., [1948] O.R. 827, [1948] 4 D.L.R. 741, which directed the defendant husband to secure maintenance for the plaintiff. The plaintiff also served notice of a motion to increase the amount of the monthly payments ordered by the judgment.

1st February 1949. The appeal was heard by HENDERSON, ROACH and HOPE JJ.A.

*K. G. Morden, K.C.* (*W. J. Henderson*, with him), for the defendant husband, appellant: The sole issue in this appeal is as to the power of the Court to order a husband to secure maintenance on a contingent interest in an estate. Under s. 1 of The Matrimonial Causes Act, R.S.O. 1937, c. 208, an order may be made for security, but that order, unlike one for the payment of maintenance under s. 2, is not subject to later review. Maintenance must be secured at the time of the order: *Shearn v. Shearn*, [1931] P. 1. There is no power to vary an order for secured maintenance, which should become effective immediately from the time of the judgment absolute: 10 Halsbury, 2nd ed. 1933, p. 789. In *Harrison v. Harrison* (1887), 12 P.D. 130 at 131, a reversionary interest was held to be an interest on which security could be given, but there is no case where security has been ordered upon such an interest as this defendant has. This is not

an order to make payments in the future, but an order to give security now for future payments. Even if the defendant husband attains the age of 35, it may be many years before his interest in the estate produces income, since his father may live for years. It would be impossible for the Local Master to determine the extent of the charge necessary to produce maintenance at the stated rate, since payments might not be commenced for 20 or 30 years. In *Blyth v. Blyth*, [1943] P. 15, [1942] 2 All E.R. 469, the parties agreed as to terms, but that is not the case here.

*H. L. Cartwright*, for the plaintiff, respondent: This is not an involved matter, as it was in *Shearn v. Shearn*, *supra*. I can find no case in Ontario under this section of the Act which is in point here. In England the practice was to take the security and order a sale, but that is not done here. [ROACH J.A.: Does the Court, acting under s. 1, direct the husband to execute a document to secure?] Apparently it withholds the judgment absolute until after execution of the necessary documents: *Wilson v. Wilson* (1920), 17 O.W.N. 426.

The \$100 a month ordered under s. 2 is insufficient, and should be increased. The trial judge considered only the defendant husband's salary, and disregarded amounts which he receives from the estate. This is clearly wrong: *Howard v. Howard*, [1945] P. 1, [1945] 1 All E.R. 91.

*K. G. Morden, K.C.*, in reply: In England, the Court orders the husband to execute a document by way of security, but there is no difficulty in Ontario because here, if the husband does not execute the document someone may be appointed to execute it for him. The granting of the judgment absolute should not be delayed where, as here, the defendant is not in a position to secure the maintenance: Rayden on Divorce, 4th ed. 1942, p. 413; *Skipwith v. Skipwith*, The Times, July 24, 1928. How can we assign in this case?

*Cur. adv. vult.*

21st February 1949. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the defendant husband from the judgment pronounced by Mr. Justice Wells, in so far as that judgment directs the said defendant to secure maintenance for the plaintiff on his interest in the estate of Joseph P.

Hanley and directs a reference to the Local Master at Kingston to ascertain the extent of the charge necessary on that interest and the nature of the charge or deed of security to be executed by the said defendant.

The plaintiff's claim in the action was for the dissolution of her marriage to the defendant (on account of his adultery with his co-defendant), for custody of the two infant children of the marriage, and for maintenance pursuant to the provisions of The Matrimonial Causes Act, R.S.O. 1937, c. 208, or, alternatively, alimony.

The judgment dissolves the marriage and awards custody of the children to the plaintiff with defined access to them in favour of the father. The judgment provides maintenance for the plaintiff as follows:

Para. 3: It orders and adjudges that the defendant husband do pay to the plaintiff the sum of \$25 weekly during their joint lives and so long as the plaintiff remains chaste or until she remarries or until the Court shall otherwise order.

Para. 4: It orders and adjudges that the defendant husband do secure to the plaintiff for her life and so long as she remains chaste or until she remarries, the additional sum of \$1,200 a year, to be paid in equal monthly instalments, upon his interest in the estate of Joseph P. Hanley, the payments so secured not to commence until the said defendant's interest in that estate produces the payments so secured.

Para. 5: It directs a reference to the Local Master at Kingston to determine, recommend and report (a) the extent of the charge necessary on the defendant's interest in that estate to secure the payments mentioned in para. 4, and (b) the nature of the charge or deed of security to be executed by the defendant.

Para. 6: It orders and adjudges that pronouncement of the judgment absolute be suspended until after the report of the Local Master has been confirmed and the charge or deed of security has been executed by the defendant.

The Matrimonial Causes Act provides as follows:

"1. In any action for divorce or to declare the nullity of any marriage, the Court may order that the husband shall secure to the wife, unless she has been guilty of adultery, such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, and to the



ability of the husband and to the conduct of the parties, may be deemed reasonable and may suspend the pronouncement of the judgment absolute until all necessary deeds and instruments have been executed.

"2.—(1) In addition to or in substitution for an order under section 1 the Court may direct the husband to pay to the wife, unless she has been guilty of adultery, during the joint lives of the husband and wife and so long as she remains chaste such monthly or weekly sum for her support and maintenance as the Court may think reasonable. . . ."

The defendant husband has a contingent interest in the estate of his grandfather, Joseph P. Hanley, who died on the 8th January 1930. That contingent interest is created by the residuary clause in the will, which reads as follows:

"All the rest and residue of my estate both real and personal of every kind, nature and description wherever situate, but charged with the payment of the aforesaid legacies, I give devise and bequeath to my executors hereinafter named in trust to hold the same for the use and benefit of my son James Stephenson Hanley and to pay the income thereof to him (to the extent hereinafter named), for and during the term of his natural life, and after his death to hold the same for the use and benefit of my grandson Joseph Lefevre Hanley and to pay the income to him (to the extent hereinafter named): and upon his death prior to the attainment of the age of thirty-five years to convey the same to his child or children share and share alike, if he leaves issue, and otherwise to divide the same equally among those of my brothers and sisters who may be living at that time, and in case none of my brothers or sisters is living at that time then among my nephews and nieces then living; but if my said grandson attains the said age of thirty-five years, I direct my executors to convey to him absolutely at that time the whole residue of my estate, charged, however, as aforesaid."

By a subsequent provision in the will and by a codicil thereto, the incomes payable to the son of the testator and to the grandson (the present defendant husband) are limited to \$5,000 per year and any surplus of income is directed to be accumulated and utilized as capital.

The father of the defendant is still living and is said to be about 56 years of age. The defendant husband has not yet

attained the age of 35 years. At the date of the trial, November 1947, he was 32 years of age. The defendant husband has no assets except a vacant lot, the value of which is small, other than his contingent interest in his grandfather's estate.

Sections 1 and 2 of The Matrimonial Causes Act both deal with maintenance. Section 2 expressly states that the payments directed to be made thereunder are for the support and maintenance of the wife. There is no such express language in s. 1, but it is otherwise clear that the amounts thereby authorized to be secured are by way of maintenance.

Those sections, and the effects of orders made thereunder, differ in a number of important respects.

Payments ordered to be made under s. 2 may continue only during the joint lives of the husband and wife. Payments ordered to be secured under s. 1 may continue for the life of the wife.

An order under s. 1 is final, and cannot be later reviewed except on appeal or by way of rectification of some error or slip on the face of the order. The wife takes the benefit of the security and must look to it alone; if it fails to yield the expected income, she cannot call upon the husband to make good the deficiency: 10 Halsbury, 2nd ed., 1933, p. 789, s. 1251.

An order made under s. 2 may be later discharged, modified or temporarily suspended: s. 2(1) (a), or varied by increasing the amount payable: s. 2(1) (b).

In fixing an amount to be paid under s. 2 the Court takes into consideration the present ability of the husband. As has been pointed out, if that ability should later change, the amount to be paid may be varied by a subsequent order.

One of the standards by which any amount ordered to be secured under s. 1 is to be fixed is also the "ability of the husband", but because an order under that section is not reviewable, I do not think that the Court is confined in its consideration of ability to present ability. I think the Court is entitled to, and should, take into consideration future ability which it can presently reasonably measure by a reference to assets available by way of security. Take the case where a husband is to-day entitled, perhaps under the terms of a will, to assets presently earning an annual income of \$5,000, but under the terms of the will the income is to be paid, during the succeeding year only, to some other person or persons. Unless the Court were entitled to take

into consideration the future ability of the husband, that is, his ability at the end of the year in the case illustrated, if the husband had no other assets it could not make any order under s. 1, notwithstanding that other circumstances justified and indeed called aloud for such an order. In the case illustrated the Court could make an order under s. 1 securing payments to commence when the husband would be otherwise entitled to the income.

The facts in the instant case, no doubt, have prompted the foregoing illustration. It is true that in the instant case the husband is entitled only to a contingent interest in his grandfather's estate. If he should die before attaining the age of 35 years, the corpus of that interest goes to others. Even if he attains that age, the father continues to receive the income up to \$5,000 until his death.

The present contingent interest of the husband is alienable and I can see no reason why the wife should not be secured by it or an aliquot proportion of it for a portion of the income which it may earn at the time when that income is free from the claim of the life tenant. The future ability of the husband, which the Court can presently regard, is dependent upon, and to be measured by, the earning power of the residue of the estate at that time.

Then, can the Court reasonably measure that ability? I think it must be in a position to do so before it can make any order under s. 1. This is so because the Court must hold the scales evenly between the husband and the wife and fix an amount under s. 1 having due regard to their respective interests.

The capital of the estate in the hands of the trustees as of 31st December 1945 amounted to \$289,876.07. Included in the estate assets are government and municipal bonds, which as of that date had a book value of \$106,939.75, and which were bearing interest at rates ranging from 3 to 6 per cent. per annum. Giving due regard to contingencies which might affect the earning power of those assets adversely, it may presently be reasonably concluded that if and when the husband becomes entitled to the income, the amount ordered to be secured to the wife and payable as of that time is reasonable having regard to the total of that income.

Legislation comparable to ss. 1 and 2 of the Ontario Matrimonial Causes Act is found in the English Matrimonial Causes



Act, 1907, 7 Edw. VII, c. 12, s. 1, subss. 1 and 2, later included in The Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, s. 190. Counsel for the respondent stated that he was unable to find any reported decision under the English legislation in which the Court ordered a husband to give security on a contingent interest. I have made a considerable search since this appeal was argued and I have not been able to find any such reported case.

In *Harrison v. Harrison* (1887), 12 P.D. 130, the future interest of the husband was reversionary. At p. 133, Butt J. says: "On the part of the respondent it is contended that under s. 32 of 20 & 21 Vict. c. 85, the Court has no power to deal with a reversionary interest of the husband, or with income other than his income at the time of the dissolution of the marriage. Although I cannot accede to that argument to its full extent, I have come to the conclusion that the present income of the husband should alone be dealt with, and that reversionary interests should not be resorted to, except under special circumstances, as for instance where there are no other means of insuring provision for the wife."

Counsel for the appellant relied upon the judgment in *Shearn v. Shearn*, [1931] P. 1, in support of his contention that unless the proposed security is producing an income presently available by way of maintenance, no order should be made under s. 1. There are statements contained in that judgment which seem to support that proposition. For example, at p. 5 it is said: "As regards the wife the object of the whole procedure is to provide maintenance from the time she has divorced her husband." And at p. 7: "The plantation and shares in the companies yield no income and may yield no income for years, and the reversionary interest may never yield any income. The object is to provide present maintenance for the wife. How can I attain that object by ordering the husband to secure the payment of a given sum per annum by a charge upon the shares in the plantation or the shares in the companies or the reversionary interest? It cannot be done."

That decision is not binding on me, and with deference I think that s. 1 of our Act may be given an interpretation sufficiently broad to authorize the making of an order such as that appealed against.

In my opinion, the Court had jurisdiction to make the order appealed against; the circumstances justified that order in addition to an order under s. 2; the amount is reasonable. I would, therefore, dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, respondent: Cartwright & Cartwright, Kingston.*

*Solicitor for the defendant husband, appellant: William James Henderson, Kingston.*

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[COURT OF APPEAL.]

**Dokuchia v. St. Paul Fire & Marine Insurance Company.**

*Insurance—Automobile Insurance—Recovery by Third Person against Insurer—Conditions of Recovery—Whether Judgment for Claim Covered by Policy—The Insurance Act, R.S.O. 1937, c. 256, s. 205(1).*

A plaintiff who seeks to recover against an insurer under s. 205(1) of The Insurance Act must prove: (1) that he has a claim against the insured for which indemnity is provided by the policy; and (2) that he has a judgment therefor: *Dokuchia v. St. Paul Fire & Marine Insurance Company*, [1947] O.R. 417, applied. If it appears that the judgment in the earlier case was based upon something other than the operation of a motor vehicle, and that the Court expressly held that the plaintiff's injuries did not arise from the operation of a motor vehicle on the highway, he cannot succeed under s. 205(1), because his judgment is not for a claim for which indemnity is provided by the policy.

AN APPEAL by the defendant from the judgment of Wilson J., 15 I.L.R. 115, [1948] 4 D.L.R. 223, on the second trial of the action, in favour of the plaintiff. The history of the proceedings is set out in the reasons for judgment.

18th and 19th October 1948. The appeal was heard by ROBERTSON C.J.O. and ROACH and AYLESWORTH J.J.A.

*T. N. Phelan, K.C. (J. S. McKinnon, with him)*, for the defendant, appellant: This action is brought under s. 205 of The Insurance Act, R.S.O. 1937, c. 256, and under that section the plaintiff must prove two things, *viz.*, (a) that he is a person having a claim for which indemnity is provided by a policy issued by the defendant, and (b) that he has a judgment for that claim. The

only evidence relevant and admissible to establish the nature of the plaintiff's claim is that given in the first action, leading to the judgment which is the foundation of this action. The onus is on the plaintiff to show that his claim is within the four corners of the policy: *Harrison v. The Ocean Accident & Guarantee Corporation Limited*, [1948] O.R. 499, 15 I.L.R. 92, [1948] 3 D.L.R. 445. [AYLESWORTH J.A.: Does it necessarily follow that the plaintiff cannot give additional evidence, in his action against the insurer, to show that his claim comes within the policy?] To do so would be to take the action out of s. 205, which is a derogation from the common law and must be strictly construed. [ROACH J.A.: The Act surely means that the judgment must be for a personal injury. In the second action it is the same injury, but surely the evidence could be supplemented.] Then it would not be a "judgment therefor". [ROBERTSON C.J.O.: Would the insurer be bound by the evidence in the original action?] Neither side could adduce further evidence.

If evidence were to be given *de novo*, then the claim in the second action might be shown to be something different from that for which the judgment was obtained. The plaintiff produces the claim, the evidence, the judgment and the policy. The Court then states the effect of all the material. If the judgment in the first action, whether by error or by inadvertence, is not based on the evidence, it is not binding on the insurer, who was not a party to that action. If the judgment, in fact or in law, is not based on a claim for which indemnity is provided by the policy, then the insurer cannot be held liable under s. 205.

In the original action, *Dokuchia v. Domansch*, [1945] O.R. 141, [1945] 1 D.L.R. 757, Laidlaw J.A., with whom Henderson J.A. agreed, said that the claim did not arise out of the operation of a motor vehicle on a highway, but was based upon the common law liability for ordering a man to do a dangerous thing. [ROACH J.A.: Suppose it were a case of intoxication?] No breach of a condition would relieve the insurer.

The development of s. 205 has gone through three stages. The Insurance Act, R.S.O. 1927, c. 222, s. 85, provided that a person who recovered a judgment; and who could not obtain payment, could stand in the shoes of the insured. Then, by The (Automobile) Insurance Act, 1932, c. 25, a new s. 183*h* was enacted, and was entirely different from s. 87(4) of The Highway Traffic Act, R.S.O. 1927, c. 251, as enacted by 1930, c. 47, s. 6.



The exclusions from liability under an automobile liability policy are set out in s. 201 of The Insurance Act. This case is similar to the *Harrison* case, *supra*, in that there was no endorsement and no extended coverage. The onus is on the plaintiff to show that he does not come within the exclusions. Here he comes under both clause *d* and clause *f*. Clause *d* is differently worded from s. 47(2) of The Highway Traffic Act, R.S.O. 1937, c. 288, and it is The Insurance Act that is relevant here. The injury to the plaintiff is not covered by our policy, because he was either an employee of the insured, or a person being carried in or upon the vehicle.

Even if the plaintiff were otherwise entitled, he would not be entitled to his full claim in this action. All that he can recover under s. 205 is "insurance moneys payable under the policy". Here he claims interest on his original judgment, and the costs of the first action. The insurer, under s. 200(c) of the Act, is required to pay all costs in an action defended by it, but we did not defend the original action: *Barrett et al. v. Indemnity Insurance Co. of North America*, [1935] O.W.N. 321, 2 I.L.R. 392.

Two statements were made by the trial judge in the original action, *Dokuchia v. Domansch*, [1944] O.W.N. 461, [1944] 3 D.L.R. 559, that were not supported by the evidence. These were, (a) that the insured (the defendant in that action) knew that there was something wrong with the engine; and (2) that the plaintiff had been run over by the truck.

A further point is that no notice was given to us of the amendment of the pleadings in the original action. Where there is an amendment that makes a material change, the insurer is entitled to notice: *Marginson v. Blackburn Borough Council*, [1939] 2 K.B. 426, [1939] 1 All E.R. 273. Here we had notice of the original writ, in which the plaintiff claimed as an employee (clearly not within the policy), but we were given no notice when he made his amendments, to set up a claim arising out of the operation of a motor vehicle. He is therefore estopped from claiming against us. [ROACH J.A.: Surely that rule would apply only if the plaintiff, at the time, was aware of the existence of the policy.] I submit not: *Jorden et ux. v. Money* (1854), 5 H.L. Cas. 185 at 210, 212, 10 E.R. 868; *Pickard v. Sears et al.* (1837), 6 Ad. & El. 469, 112 E.R. 179; Spencer Bower on Estoppel by Representation, 1923, pp. 129 *et seq.*

The trial judge was in error in permitting the giving of evidence as to employment: *Larson v. Boyd et al.*, 58 S.C.R. 275 at 281, 46 D.L.R. 126, [1919] 1 W.W.R. 808.

Generally, as to whether the plaintiff's claim is one for which indemnity is provided by the policy, I refer to *Bourgeois et al. v. Prudential Assurance Company Limited*, 18 M.P.R. 334, 13 I.L.R. 1, [1946] 1 D.L.R. 139; *British Columbia Electric Railway Company, Limited v. Loach*, [1916] 1 A.C. 719 at 721, 23 D.L.R. 4, 8 W.W.R. 1263, 20 C.R.C. 309, 32 W.L.R. 169.

Finally, this action is neither in form nor in fact a class action, as required by s. 205 of The Insurance Act.

*C. L. Yoerger*, for the plaintiff, respondent: As to the action being a class action, the statement of claim sets out that the plaintiff is suing on behalf of himself and all other persons having judgments or claims, and this is proper practice. The style of cause would be amended as a matter of course: *Barchard & Co. Limited v. Nipissing Coca Cola Bottle Works Limited*, 42 O.L.R. 196 at 200, 202; *Holmsted & Langton's Ontario Judicature Act*, 5th ed. 1940, p. 517.

As to the costs of the original action, these are included in the judgment on which our present action is based. We are in no way concerned with s. 200. We should also be entitled to interest, so long as the limit of liability under the policy is not exceeded.

In the previous appeal in this action, it was argued that the defendant was not a party to the original action and could not be bound by the findings of fact of the trial judge in that action. Counsel is now taking an entirely different attitude. We say that there is evidence to support the findings, and further, that if evidence is lacking in any respect, we should be permitted to supply it in this action. If we must look to the record of the earlier action alone, then the reasons for judgment in that action must be adopted. [ROBERTSON C.J.O.: You are bound by the record in the original action, because you are suing on the judgment. I cannot see why it should bind the insurer.] We prove certain things. Counsel for the respondent now says there is no evidence to support the findings.

As to the question of estoppel, how can we be affected by the fact that the insured did not give notice of the amendment to his insurer? We made no representations to the insurance company, and are not bound by the actions of the insured: *Walker et al. v.*

*Hyman* (1877), 1 O.A.R. 345 at 351; 13 Halsbury, 2nd ed. 1934, p. 444, s. 499. The insurance company knew that we had a right to amend before trial, and we cannot be bound by an oversight on the part of the insured's solicitor.

There was a definite finding of fact, in the original action, that the plaintiff was not an employee of the insured at the time of the accident, and this was a finding made by the trial judge on a consideration of conflicting evidence. It was further definitely held that the plaintiff was not being carried in the truck, and was therefore not barred by s. 47(2) of The Highway Traffic Act. That section constitutes a derogation from the common law, and must be strictly construed: *Cushing v. Dupuy* (1880), 5 App. Cas. 409, C.R. [8] A.C. 355, 1 Cart. 252, 24 L.C. Jur. 151; *Harrison v. Toronto Motor Car Limited and Krug*, [1945] O.R. 1, [1945] 1 D.L.R. 286; *Harrison v. The Ocean Accident & Guarantee Corporation Limited*, [1948] O.R. 499, 15 I.L.R. 92, [1948] 3 D.L.R. 445. It surely cannot be argued that we were "alighting" from the motor vehicle, since that word implies volition, and means we were in the course of getting out.

The actual decision in the previous action was that we were not precluded from recovering by s. 47(2) of The Highway Traffic Act. The reasons of Laidlaw J.A. are not necessarily the judgment of the Court.

*T. N. Phelan, K.C.*, in reply: As to the argument with reference to s. 200 of the Act, the plaintiff (assuming everything else in his favour) has recourse only to moneys payable under the policy, and all that is covered by the policy is damages, and not costs. [AYLESWORTH J.A.: Do you say that in no event can an insurer, if it does not defend the action against its insured, be liable to pay the costs of a third person who recovers a judgment against the insurer?] That is our position.

The reasons for the judgment sued on are binding on the plaintiff, and, to the extent that they showed that the judgment was for a claim for which indemnity was provided by the policy, they would be binding on us. Here the plaintiff has failed to bring himself within s. 205, because his judgment is not for a claim arising out of the operation of a motor vehicle, but is based upon a common law liability.



I am not required to discuss s. 47(2) of The Highway Traffic Act, which in no way enters into this action.

*Cur. adv. vult.*

28th February 1949. The judgment of the Court was delivered by

ROACH J.A.:—The defendant was the insurer of one Domansch in respect of an automobile truck, under a policy of insurance described as a “Standard Automobile Policy (Owner’s Form)”. Included in the coverage thereby provided is the following:

“The insurer agrees to indemnify the Insured . . . against the liability imposed by law upon the Insured . . . for loss or damage arising from the ownership, use or operation of the automobile . . .

“*Provided always that the Insurer shall not be liable . . .*

“(d) For any loss or damage resulting from bodily injury to or the death of any person being carried in or upon or entering or getting on to or alighting from the automobile; or

“(e) For loss or damage resulting from bodily injury to or the death of any employee . . . while engaged in the operation or repair of the automobile. . . .”

On Monday the 23rd November 1942 the plaintiff was injured under circumstances which will later appear, and subsequently he brought an action against Domansch to recover damages for those injuries. That action was tried by Mr. Justice Urquhart, without a jury, who awarded the plaintiff judgment for \$4,361 and costs: *Dokuchia v. Domansch*, [1944] O.W.N. 461, [1944] 3 D.L.R. 559. Domansch appealed against that judgment and this Court dismissed his appeal: [1945] O.R. 141, [1945] 1 D.L.R. 757.

The plaintiff then brought this action to recover the amount of his judgment and costs. It was first tried by Mr. Justice Mackay, who gave judgment for the plaintiff for the amount of his claim: 13 I.L.R. 103. The defendant appealed against that judgment, and this Court allowed the appeal and directed a new trial: *Dokuchia v. St. Paul Fire & Marine Insurance Company*, [1947] O.R. 417, 14 I.L.R. 114, [1947] 3 D.L.R. 21.

The action next came on for trial before Mr. Justice Wilson, who gave judgment for the plaintiff: 15 I.L.R. 115, [1948] 4 D.L.R. 223. From that judgment the defendant now appeals.

The grounds of appeal are several, but in the view I hold it is necessary to consider one only of them, *viz.*, that the trial judge erred in holding that the plaintiff had established a claim against the defendant under s. 205(1) of The Insurance Act, R.S.O. 1937, c. 256.

Section 205(1) of The Insurance Act provides that: "Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied."

Under that section the plaintiff must prove, in an action against the insurer:

First, that he had a claim against the insured for which indemnity is provided by the policy.

Second, that he has recovered a judgment therefor.

This Court so held, although in different language, on the appeal from the judgment of Mr. Justice Mackay.

Then, has the plaintiff proved in this action those two essentials? He proved:

(a) His judgment against Domansch, and that it remained unsatisfied.

(b) The policy of insurance, and that it was in full force and effect at the relevant time.

(c) The entire record in the original action, including a transcript of the evidence given in that action, and the reasons of the learned trial judge and of the judges of this Court. All this was filed with the helpful co-operation of counsel for the appellant.

The plaintiff's claim in the original action, as endorsed on the writ of summons, was as follows:

"The Plaintiff's claim is for \$5,000 damages for injuries sustained by the plaintiff while working for the defendant on truck being driven by the defendant."

The plaintiff's statement of claim in the original action contained the following allegations:

Para. 2: "The plaintiff was employed at Arbor Vitae as driver for the defendant's truck and on the 23rd of November, 1942, the defendant who was driving in the truck with the plaintiff said he would drive and directed the plaintiff to pour gasoline in the carburetor while he, the defendant, drove."

Para. 3: "While obeying the instructions of his employer, the defendant, there was an explosion and the plaintiff was thrown to the ground and the truck heavily loaded ran over him."

Para. 6: "The said defendant was grossly negligent in directing his said employee to undertake work which was dangerous and which caused the injuries complained of."

In his statement of defence the insured denied that the plaintiff was employed by him and averred that the plaintiff was a voluntary passenger riding with the defendant in the truck; he denied giving the plaintiff any instructions and averred that the pouring of gasoline into the carburetor was the plaintiff's own idea and was done voluntarily by him, and that the injuries received by the plaintiff were accidental and not caused by any negligence of the defendant.

Subsequently, by leave of Mr. Justice Mackay, the plaintiff amended paras. 3 and 6 of his statement of claim, and, as amended, they are as follows:

Para. 3: "While obeying the instructions of the defendant, there was an explosion and the plaintiff was thrown to the ground and before he could move out of the way the truck heavily loaded ran over him."

Para. 6: "The said defendant was grossly negligent in directing the said plaintiff to undertake work which was dangerous and which caused the injuries complained of and was also negligent in striking the plaintiff while the plaintiff was standing on the ground."

No amended statement of defence was delivered to that amended statement of claim.

The learned trial judge in *Dokuchia v. Domansch* found as a fact that at the time of the accident the relationship of master and servant did not exist between the plaintiff and Domansch. He also held that the plaintiff did not come within s. 47(2) of The Highway Traffic Act, R.S.O. 1937, c. 288, as being a "person being carried in, or upon, or entering, or getting on to or alighting from such motor vehicle". In so holding he relied upon the



decision of this Court in *Koos v. McVey*, [1937] O.R. 369, [1937] 2 D.L.R. 496. He further held that Domansch was negligent, and that his negligence consisted of:

(a) "Knowingly operating a defective truck upon the highway";

(b) "ordering (or even allowing) the plaintiff to get in a position of extreme danger, such as he did";

(c) "driving the truck with the plaintiff in that position with a dangerous substance in his hands";

(d) "not having control over the truck."

The appeal to this Court was heard by a Court composed of Henderson, Laidlaw and McRuer JJ.A. While their reasons are fully reported, it is convenient shortly to refer to and quote from them.

Laidlaw J.A. in his reasons referred to the findings of fact made by the learned trial judge and stated that they were amply supported by the evidence and were accepted by him as correct. He put the defendant's liability on the following grounds:

"The plaintiff's injuries were not caused by negligence in the operation of a motor vehicle on a highway or by reason of a motor vehicle on a highway. The motor vehicle was no doubt the instrument and object in collision with the plaintiff but the real cause—the *causa causans*—was the explosion of gasoline being used by him in compliance with the defendant's request or directions. The liability of the defendant for mischief resulting therefrom does not arise from the provisions of The Highway Traffic Act but is found in the common law. The statute has no application whatsoever to the particular circumstances of this case."

McRuer J.A., as he then was, in his reasons stated that, having read the reasons of Laidlaw J.A., he agreed in the result. He then added: "... even if it can be held that the plaintiff's injuries were sustained 'by reason of negligence in the operation of [a] motor vehicle on a highway', the provisions of s. 47(2) of The Highway Traffic Act do not bar his right to recover damages against the defendant", referring to *Koos v. McVey*, *supra*.

HENDERSON J.A. in his reasons said that he agreed with the view expressed by Laidlaw J.A. that The Highway Traffic Act had no application to this case, and that he also agreed with the

reasons of Laidlaw J.A. for dismissing the appeal. Then he added that if The Highway Traffic Act applied he agreed with McRuer J.A., with the same result.

The aggregate result of those reasons is that the decision of this Court on that appeal was that the injuries of the plaintiff did not arise from the use or operation of the truck.

That decision is binding on the parties to that action. I wish it were not also binding on me because, with the utmost respect, I think it was wrong, and that the plaintiff's injuries did arise from the use or operation of the truck as found by Urquhart J.

The inevitable result is that the plaintiff in the present action does not come within s. 205(1) of The Insurance Act, *supra*, as being a person having a claim against an assured for which indemnity is provided by the policy of insurance and as having a judgment therefor.

The appeal must therefore be allowed and the action dismissed but in all the circumstances I think both should be without costs.

*Appeal allowed and action dismissed.*

*Solicitor for the plaintiff, respondent: C. R. Fitch, Fort Frances.*

*Solicitors for the defendant, appellant: McMaster, Montgomery, Steele, Willoughby, McKinnin & MacKenzie, Toronto.*

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## [COURT OF APPEAL.]

**Rex v. Calhoun.**

*Criminal Law—Rape—Charge to Jury—Admissibility and Evidentiary Value of Complaint—Included Offences.*

*Criminal Law—Charge to Jury—Reasonable Doubt—Judge Telling Jury to Decide which Witness Telling the Truth.*

An appeal from a conviction for rape was dismissed, the appellant's principal submissions being disposed of as follows:

- (1) The trial judge had not, as argued by counsel, admitted evidence of two successive complaints by the prosecutrix. What had happened was that the prosecutrix, on returning home after the alleged offence, immediately and spontaneously complained to her room-mate, A. While she was telling her story, another woman, B, entered the room, and the prosecutrix continued with her story. Even if, as was probable, the prosecutrix repeated, for the information of B, what she had already told A, it was all one complaint, started when the prosecutrix was alone with A and continued after B entered the room, and it was properly admitted in evidence.
- (2) In the particular circumstances of the case, and on the evidence of the prosecutrix and the accused (who admitted the act of intercourse, but claimed that it was with the prosecutrix's consent), the trial judge had been right in telling the jury that they need not consider included offences, and that there were only two possible verdicts, *viz.*, guilty or not guilty.
- (3) The trial judge had correctly charged the jury in respect of the evidentiary value of the complaint, when he said that it "negated consent", in that a woman who had consented to such an act would not complain about it at the first opportunity, and that it showed the consistency of her conduct with her story told in the witness-box. *Rex v. Osborne*, [1905] 1 K.B. 551, quoted and applied.
- (4) Although the trial judge had erred in telling the jury that they must decide whether the prosecutrix or the accused was telling the truth, and this instruction, if it had stood alone, would have been fatal to the conviction, yet the passage in which this remark occurred came between two passages in the charge in which the trial judge adequately and correctly charged the jury with respect to the doctrine of reasonable doubt, and it must be read (and must have been understood by the jury) as subject to what was said in those passages.

AN APPEAL by the accused from his conviction, before Kelly J. and a jury, for rape.

18th January 1949. The appeal was heard by ROBERTSON C.J.O. and ROACH and AYLESWORTH JJ.A.

*J. F. McGarry, K.C.*, for the accused, appellant: 1. The trial Judge withdrew from the jury the consideration of everything except consent, telling them that everything else was admitted by the accused. Only the jury has the right to find whether all the essentials of the offence are present, and an "admission" by the accused is only one piece of evidence, to be weighed by the jury with the rest of the evidence.



2. The trial judge withdrew the consideration of included offences, telling the jury that it was "rape or nothing", and that there were only two possible verdicts. The jury might have believed the complainant's story about the first attempt to escape, in which case the accused would have been guilty of an indecent assault, and they might have believed his story as to the second occasion, finding the accused not guilty of rape because the complainant consented.

3. The trial judge told the jury that the complaint "negatived" consent. It is true that this word was used in *Reg. v. Lillyman*, [1896] 2 Q.B. 167, 18 Cox C.C. 346, but I submit that it is an unfortunate one. The jury might have thought that it meant that the making of the complaint destroyed the effect of a real consent previously and actually given.

4. The trial judge told the jury that if they concluded that a witness was lying on one matter, his evidence in other respects was of little, if any value. This is quite incorrect. It may be that the accused lied on one point only, but if the jury came to the conclusion that he had done so they would be required to reject the whole of his evidence.

5. The effect of the trial judge's charge as to the complaint was that he indicated to the jury that it was corroborative of the prosecutrix's story as told in the witness-box, which was incorrect. He entirely failed to point out that there was no corroboration whatever on the vital issue of consent: *Rex v. Evans* (1924), 18 Cr. App. R. 123 at 124.

6. The trial judge did not define consent, but merely told the jury of certain things that would not amount to consent: *Rex v. Salman* (1924), 18 Cr. App. R. 50. He should have told them that even if there was a struggle at the outset, there might still have been a real consent before the act of intercourse took place.

7. The charge as a whole did not put the defence fairly to the jury.

[ROACH J.A.: The trial judge also told the jury at one point that they must decide whether the prosecutrix or the accused was telling the truth. Is that correct?] No, it is directly contrary to the law laid down in *Rex v. Nykiforuk*, [1946] 2 W.W.R. 266, 86 C.C.C. 151, 2 C.R. 41, [1946] 3 D.L.R. 609.

8. The evidence of Mrs. Carrier should not have been admitted, since it constituted evidence of a second complaint by the prosecutrix.

*W. B. Common, K.C.*, for the Attorney-General, respondent [directed by the Court to limit his argument to certain points]: On the whole of the evidence, the trial judge was right in telling the jury they need not consider any other offence but rape. There could not have been a conviction for any included offence. The whole transaction must be treated as one incident, and the only issue was consent. There could be no suggestion of an indecent assault. This case is wholly distinguishable from *Rex v. Quinton*, [1947] S.C.R. 234, 88 C.C.C. 231, 3 C.R. 6, [1948] 3 D.L.R. 625, and the cases there relied on.

The trial judge merely suggested that a witness who had committed perjury in one respect might have done it in other respects. It was not a categorical instruction that they were to disregard a witness's evidence entirely if they found that he had lied on one point, and he did leave to them the whole question of credibility.

I concede that the instruction that the jury must decide which witness is telling the truth is not ideal, but no particular harm could flow from it. What had already been said about reasonable doubt, and what was subsequently said on the same subject, must govern here as well.

Even if the Court should come to the conclusion that there were errors in the charge, the appeal should be dismissed under s. 1014(2) of The Criminal Code, R.S.C. 1927, c. 36.

*J. F. McGarry, K.C.*, in reply.

*Cur. adv. vult.*

28th February 1949. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the accused against his conviction by a jury before Kelly J. at the city of Sudbury on the 20th October 1948, of the crime of rape.

At the trial the accused gave evidence on his own behalf and admitted that the act of intercourse took place with the prosecutrix but stated that she consented thereto.

Counsel for the appellant argued that there was a mistrial because: (1) the learned trial judge improperly admitted a complaint made by the prosecutrix in her home immediately

upon her return there following the alleged offence; and (2) in the charge of the learned trial judge to the jury there was both misdirection and non-direction amounting to misdirection; and that by reason thereof this Court should direct a new trial.

The complainant was an unmarried woman, 22 years of age, residing in the city of Sudbury in the home of a Mrs. Carrier whom she had known since infancy. In that home she slept in a room with another young woman who is a sister of Mrs. Carrier.

The accused is a married man living apart from his wife. He had been acquainted with the complainant for four or five months, having first met her at a party in the home of some mutual friends. On the night of Friday 11th June 1948 he telephoned her from a nearby hotel where he had been drinking beer with some acquaintances and suggested to her that he would call for her and take her out for a bottle of beer. The hour was rather late—about 10.30 o'clock—and by reason thereof she at first disapproved the suggestion. However, he prevailed upon her to go with him and shortly thereafter called for her with his truck. He brought her home about 5.30 o'clock the following morning.

The complaint which counsel argued was improperly admitted in evidence was made by the prosecutrix immediately upon her entry into the room occupied by her and her room-mate for sleeping purposes. The evidence of her room-mate is that she was awakened when the prosecutrix entered and she observed her crying and in a highly nervous condition. Her clothing was mud-stained; her undergarments were torn and bloody; there was grass in her hair; she had a number of scratches on her legs and one on her nose. The room-mate knew that the prosecutrix had gone out with the accused; she had heard the telephone conversation the night before and saw them leaving together. Spontaneously the prosecutrix complained to her room-mate and the story she told was in substance as follows: That she had gone with the accused the night before for some beer and that after leaving the hotel beverage-room, instead of coming towards home, the accused had driven his truck out the highway and turned on to a little-used road and stopped at a rather isolated spot; that the accused had got "fresh" with her; that she had got out of the truck in an effort to escape from him and that he eventually, against her will, had sexual intercourse with her.



While the prosecutrix was relating that story to her room-mate Mrs. Carrier, in the adjoining room, was awakened by the commotion and immediately came into the room occupied by the two young women. She observed the condition of the prosecutrix and at once inquired: "What is the matter?" She got no response because the prosecutrix was sobbing. She repeated the inquiry and then, between sobs, the prosecutrix continued with her complaint earlier started to her room-mate, no doubt repeating for the benefit of Mrs. Carrier part of what she had already told to her room-mate.

Counsel for the appellant argued that what the prosecutrix told Mrs. Carrier was a second complaint and not admissible. I disagree with that contention. It was all one complaint, started when the prosecutrix was alone with her room-mate and continued when Mrs. Carrier entered the room, and the whole of the complaint made to her room-mate and to Mrs. Carrier was properly admitted in evidence.

In his charge to the jury the learned trial judge said that, having regard to the evidence, there were only two possible verdicts, guilty or not guilty. He explained to the jury that frequently in cases where an accused is charged with rape it is open to the jury to find the accused not guilty of rape but guilty of one or other of the lesser offences of indecent assault or common assault but that in this case, the accused having admitted in evidence the completed act, it was rape or nothing.

Counsel for the appellant argued that the foregoing instructions constituted misdirection and that the lesser offences should have been left with the jury as possible verdicts. In my opinion the learned trial judge was right. It was a case of "rape or nothing".

The evidence of the accused was that his conduct toward the prosecutrix was not a succession of incidents separated by any appreciable period of time and culminating in the act of intercourse, but that it was one continuous uninterrupted event beginning with a suggestion by him in which she acquiesced, followed immediately by his placing his hands upon her indecently and thereafter by the act of intercourse which, according to him, took place in the cab of the truck, and to the whole of which she consented. On his evidence he committed no crime.

The evidence of the prosecutrix was that when she and the accused got into the truck at the hotel and she saw that he was not driving in the direction of her home, she protested mildly, having regard to the lateness of the hour, and that he replied that they would go for a drive. Although she had protested mildly, she acquiesced, stating in evidence that she saw no harm in it. The lonely, little-used road on to which the accused later drove his truck off the highway was not familiar to the prosecutrix and there she protested that the accused should take her home. Instead he offered her a cigarette, which she took, and then without much delay he made an improper suggestion to her, the full significance of which she at once understood, and he moved toward her from behind the steering wheel. She then jumped out of the truck and ran in the direction of the highway. He ran after her, caught her and overpowered her and threw her to the ground, where she struggled and yelled, hoping that motorists passing on the highway might hear her. In the struggle he succeeded in placing his hands indecently upon her, causing her pain and rather profuse bleeding, but he did not succeed in having intercourse with her. Frustrated in his designs, he returned to the truck with her. She was planning how she might escape and shortly after getting back into the truck she hit upon the idea of pretending that she had to get out of the truck to obey nature's call. She told him of this pretended predicament and got out of the truck and this time ran toward the bush, hoping to hide from him there in the darkness. In her haste she tripped and lost her shoe and fell. When the accused discovered that she was running away he ran after her and this time overpowered her and with violence and threats had intercourse with her.

Now where in her story is there evidence on which the jury could return a verdict of a lesser offence and not of rape? If they believed her whole story, there was rape. If they disbelieved it, there was nothing. If they believed only that part of her story in which she related her second attempt to escape and what then happened, it was rape. If they disbelieved it, then there was nothing, at least in that part of her story. If they disbelieved her story of her first attempt to escape and what then happened, again there was nothing. If they believed it, there was unquestionably an indecent assault but that would not account for the fact, that is on her evidence, that the accused did have intercourse

with her. In that circumstance the intercourse could have taken place only as the accused said it did, namely in the truck with her full consent. How incongruous these two conclusions would be! They would put the prosecutrix in the position of having consented to the completed act in the truck and at the same time being the victim of an indecent assault while attempting to escape, and to escape from what? Certainly not from the accused, because on that theory she would have acquiesced in the intercourse. It is impossible to imagine any sane jury arriving at such incompatible conclusions.

On the evidence this was a case of rape or nothing and the trial judge was right in so instructing the jury.

The learned trial judge in his charge to the jury, dealing with the evidence of the complaint and the effect which might be given to it, said that:

"You will appreciate, gentlemen, the import of her statements. The mere fact that she told her story is not evidence that the events she related actually did occur, but it is evidence showing the consistency of her conduct with her story told here from the witness-box. Keep in mind that the complaint must be made at the first opportunity. It is for you to say whether this was reasonably the first opportunity or not.

"The second feature of such evidence as this is that it negatives consent; in other words, a woman who has consented to such conduct will not complain about it at the first opportunity; she may later on when she has had time to concoct a story, or think it over.

"The effect of such evidence is those two attributes: The consistency of the complainant's story in the witness-box. Was that her story throughout? Secondly, it is evidence which negatives consent. I repeat that a person who consents is not likely to make a complaint at the first opportunity. However, should you conclude that those statements were part of a plan which she had carefully thought out to show some colour in her story, then you must take that into consideration. It is for you to decide what weight should be given to it, and it is for the judge to say whether such statements may be allowed. In this case they were allowed without any question being raised as to the admissibility of such evidence. As to corroboration, it is for you gentlemen to decide whether the conduct of the complainant is consistent with her



having given consent. If you so decide, then you must find the accused not guilty."

And later he said: "I repeat that what she told is not evidence of the actual happening of the things she told, but it is evidence to show the consistency of her story here and it negatives her consent."

Counsel for the appellant founded two submissions on that part of the charge which I have quoted. He submitted first that it was misdirection to tell the jury that the complaint "negatived consent" and second, that it was also misdirection to state or imply that it was corroborative of the absence of consent. Both those submissions fail.

The law is clearly stated in *Rex v. Osborne*, [1905] 1 K.B. 551. There Ridley J., delivering the judgment of the whole Court, said: "... it appears to us that, in accordance with principle, such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix." And later: "Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent."

Another objection by counsel for the appellant arises out of the learned trial judge having said the following to the jury:

"... you must decide what statements you are going to accept by the tests which I gave to you. The stories told by the prosecutrix and by the accused are diametrically opposed in certain respects, and they cannot both be true. You must first decide which one is telling the truth; and in doing so you will have to consider the various incidents as related to you, which are more or less admitted to exist, and then decide with which story those admitted actions or results are more consistent. In so doing should you decide that any one incident is just as consistent with the story of the accused as with that of the complainant, then it is of no value to either, and you have to reject it; but if it is more consistent with one story than the other, then you can give it the weight that you think it deserves."

If that statement to the jury stood alone, I think it would be fatal. It would have been proper to tell the jury that they could

not convict the accused unless they believed the woman. The jury would not have to believe the accused in order to acquit him. It would have been sufficient if his story created in the minds of the jury a reasonable doubt. The extract which I have last quoted from the trial judge's charge is sandwiched in between two other portions thereof in which the learned trial judge did deal with the question of reasonable doubt.

In the first portion the learned trial judge said: "This is a criminal case, and in criminal cases there is always the presumption of innocence. A person accused of a crime is presumed to be innocent until proven guilty. That brings up for consideration the doctrine of reasonable doubt." Without quoting further it will suffice to say that the learned trial judge at that point properly and adequately instructed the jury on the question of reasonable doubt and that the benefit of the doubt, if one exists, must be given to the accused.

In the second portion of the charge dealing with reasonable doubt the learned trial judge said this: "As I said earlier, you do not have to consider the included offences here. In my opinion it is rape or nothing. The onus is upon the Crown to prove the guilt of an accused. If you have a reasonable doubt about it, you must give the accused the benefit of that doubt; but that doubt is not one conjured up in the mind. When you have considered the matter you will know whether or not you have a doubt."

The learned trial judge's isolated statement that "you must first decide which one is telling the truth" must be taken as being subject to what he said to the jury on the subject of reasonable doubt, and I am satisfied that the jury would so understand it.

In my opinion the learned trial judge's charge, taken as a whole, was adequate and the several objections based on that charge fail. The appeal should be dismissed. The time served pending the appeal may count against the sentence imposed.

*Appeal dismissed.*

*Solicitor for the accused, appellant: P. J. McAndrew, Sudbury.*

[GENEST J.]

**Darling Ladies' Wear Limited v. Hickey.**

*Bailment—Liability of Bailee for Hire—Whether Terms of Contract Changed—Garage Owner—Employee, contrary to Instructions, Taking Customer's Car and Damaging it.*

A garage owner is liable if his employee, having been intrusted with work on a customer's automobile, and having, with the employer's knowledge and assent, access to that automobile, takes it on "a frolic of his own" and causes damage to it. *Van Geel v. Warrington* (1928), 63 O.L.R. 143; *The Coupé Company v. Maddick*, [1891] 2 Q.B. 413, applied; *Sanderson v. Collins*, [1904] 1 K.B. 628, distinguished.

The mere fact that an automobile is left with a garage owner after the work on it has been completed does not transform the bailment into a gratuitous one. The original contract of bailment for reward remains in existence until the parties have shown, either by express words or by conduct, that they intend to alter the relationship between them. *Mitchell v. Davis* (1920), 37 T.L.R. 68, applied.

AN ACTION for damages.

4th May 1948. The action was tried by GENEST J. without a jury at Peterborough.

A. S. Pattillo, for the plaintiff.

T. J. Carley, K.C., for the defendant.

10th March 1949. GENEST J.:—This is an action by the plaintiff based on a contract of bailment by which the defendant, a garage owner, undertook to repair the plaintiff's automobile and return it. The automobile in question, while in the possession of the defendant, was damaged by the act of an employee of the defendant, who used it "upon a frolic of his own", during which "frolic" the car was totally wrecked. The damages to the plaintiff's car, agreed upon by counsel, amount to \$2,034.94. The defendant says that he was guilty of no negligence, that his employee acted without authority and not within the scope of his duties, and that the defendant is therefore not liable.

The facts, as revealed by the evidence, are substantially as follows: Mr. Charles Libman, president of the plaintiff company, had complete control of the automobile in question, a 1947 Hudson sedan, owned by the plaintiff company, and for all the purposes of the action the company acted through Mr. Libman.

On 31st July 1948, a Thursday, at about 8 a.m., Mr. Libman brought the motor car in question to the garage and service station owned and operated by the defendant Hickey. Libman was a regular customer of the defendant. On this occasion he had



brought the car there to be "simonized" and to have a tire and tube changed. He stated to the defendant that he wanted the car the same day, but at 5 or 6 o'clock in the evening he received a telephone call from the garage that the car was not ready. He called for the car the next day at 7 p.m., and there is some contradiction in the evidence as to what occurred at this moment, and it has a bearing on whether the agreement between the parties was then changed and became a gratuitous contract of bailment in lieu of a bailment for reward. The defendant, when Mr. Libman came for the car at 7 o'clock in the evening, was at the garage, and there was some discussion about Libman taking the car then or waiting until the next day. Mr. Libman says that it was Mr. Hickey's suggestion that he should wait until the next day, but Mr. Hickey's version is that Mr. Libman simply asked him to wait until the next day. It was argued by Mr. Carley that at that moment the contract was changed, and I think it may be as well for me to deal with this question at this point, before proceeding with the subsequent facts of the case. In my opinion, it makes no difference which version is correct. I think that there was no material change in the contract. The time of delivery had not been definitely agreed upon and the only object of the conversation was to fix the time of delivery, so that the original contract of bailment for reward remained in force.

This view, I think, is supported by the decision in *Mitchell v. Davis* (1920), 37 T.L.R. 68. That decision is sufficiently summarized in the headnote, which reads as follows: "Where goods are sent to a tradesman to exercise his skill upon them, his duties as a bailee do not cease as soon as his work is done. Until the parties have shown, either by express words or by conduct, that they intend to alter the original relationship between them, that relationship continues."

I find that during all the relevant times which affect this case, the relationship between the parties was that of bailor and bailee for reward. The duties of a bailee for reward are shortly set forth in 1 Halsbury's Laws of England, 2nd ed. 1931, p. 748:

"A custodian for reward is bound to use due care and diligence in keeping and preserving the article intrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depositary, and must be that care and diligence which a careful and vigilant man

would exercise in the custody of his own chattels of a similar description and character in similar circumstances."

Of course he is not, apart from special contract, an insurer, and therefore in the absence of negligence on his part he is not liable for loss or damage due to some accident, fire, the acts of third parties, or the unauthorized acts of his servants acting outside the scope of their employment, and it is the last point which offers some difficulty in the present case. The defendant had employed one Vincent Dainard to work in his garage. Dainard had been employed by the defendant for about a year before the date of the damage to the car. There was some suggestion that the defendant Hickey had been negligent in employing an improper person to work for him and intrusting to him responsibility for work in his garage. On this point I find in favour of the defendant Hickey. The evidence disclosed that he made proper inquiries and that there was nothing against Dainard, that in fact he seemed to be a capable and responsible employee, and that his escapade was an exceptional thing. On the other hand, Dainard had been intrusted with some work on the automobile in question, and moreover the evidence disclosed that he could get access to the garage at night. He had a key which was in his possession with the authority of his employer, and he had been authorized to do some work in the garage at night. It is clear, therefore, that he had been intrusted with work on this automobile and that he had access to it as an employee of the defendant.

Dainard deposed that he had helped "simonize" the car; that he had obtained a key to the garage in February; that he had quit work at 8.30 p.m. on the day in question and that he had locked the door; that he had returned that night after 9 o'clock—he says he doesn't know why—he had been drinking; and that he took the car. He knew it was Libman's car. He went up the Chemong Road to a dance-hall and picked up some friends and, in short, at about 5 o'clock in the morning he was involved in an accident which completely wrecked the automobile in question.

I have given some thought to the case of *Sanderson v. Collins*, [1904] 1 K.B. 628, which was relied upon by Mr. Carley. The Court of Appeal decided in that case that the bailee was not liable, and the facts are substantially set forth in the headnote which reads as follows:

"The defendant sent his carriage to be repaired by the plaintiff, who was a coach-builder. The plaintiff lent a carriage of his own to the defendant for use while the repairs were going on. The coachman of the defendant, without his knowledge, took the plaintiff's carriage out for his own purposes, and while he was driving the carriage it was injured through his negligence. In an action to recover the cost of repairing it:

"*Held*, that as the coachman at the time when the injury was done to the carriage was not acting in the course of his employment, the defendant was not liable."

On the other hand, the Court went to much trouble to distinguish the case from that of *The Coupé Company v. Maddick*, [1891] 2 Q.B. 413. In the latter case the bailee had been held liable for the acts of the coachman, and I quote from that judgment, written by Cave J., the following paragraph at p. 417:

"If we consider the case on the general principles of the public benefit, we arrive at the same result. Where one of two innocent parties has to suffer a loss arising from the misconduct of a third party, it is for the public advantage that the loss should fall in such a way as to diminish the probability of such a thing happening again, or, in other words, that it should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. If, under these circumstances, the loss is to fall on the owner who does not engage and cannot dismiss the servant, and who cannot recover over against him, the result is that it falls on one who could not have guarded beforehand against this accident, and who cannot prevent its recurrence, except by refusing to let out his horse and carriage in the future, which, so far from being a public benefit, is distinctly a public disadvantage, as tending to throw needless impediments in the way of business, and to render the letting and hiring of horses and carriages more expensive. If the loss is to fall on the hirer it falls on one who will thereby be led to exercise greater care in the selection of his servant, who can punish the servant for his misconduct by dismissing him, and who, theoretically at all events, has a right of action against the servant."

I believe it easier to distinguish the present case from that of *Sanderson v. Collins*, *supra*. Certainly the garage owner's employee is not in the position of a coachman. Moreover, he had work to perform on the car and had the same obligation as his



employer to take care of the chattel in question. I think this view is amply borne out by the decision of our Court of Appeal in *Van Geel v. Warrington*, 63 O.L.R. 143, [1929] 1 D.L.R. 94. The circumstances in that case are almost exactly similar to those in the present one. Reading the reasons given by Mr. Justice Middleton, it is obvious that he went to a great deal of trouble to look into the basic principles of law which apply to the relationship of the parties. It might be useful to cite the following from his reasons at p. 152:

"The finding that as a matter of law the keeper of a garage can escape liability for the loss of a car placed in his charge by its owner, upon proof that the car was improperly removed from the garage and wrecked by an employee who, contrary to his master's orders, took it from the garage upon a frolic of his own, seems so shocking and repugnant to one's ideas of justice as to invite the closest scrutiny. I am glad to arrive at the conclusion that this doctrine rests on no solid foundation.

"I think that the ordinary principles of the law of master and servant and principal and agent apply to the case of a bailee. Such a bailee as the keeper of a garage is not an assurer of the cars entrusted to him. His obligation is to 'take the same care as reasonable men ordinarily use in their own affairs;' and, had the car been taken from the defendant's care, notwithstanding the use of due diligence, by a stranger, the defendant would not have been liable.

"A master is liable for the conduct of his servant, the agent whom he selects and puts in his place to discharge the duty he has undertaken, and this law is applicable in the case of bailment. The conduct of the servant is then the conduct of the master, and the master is liable to the bailor."

I must add that I have more confidence in the reasoning followed in *Van Geel v. Warrington*, a case decided in the days of automobiles and garages, than in the case of *Sanderson v. Collins*, decided in the days of coaches, horses and coachmen, and in any event I believe that the basic principles set forth in the cases I have mentioned establish that a garage owner is liable if his employee, who has access to the garage, takes out an automobile of a customer on a frolic of his own and causes damage to it.

In consequence, I find for the plaintiff and there will be judgment in his favour in the sum of \$2,034.94 and costs.

*Judgment accordingly.*

*Solicitors for the plaintiff: Blake, Anglin, Osler & Cassels, Toronto.*

*Solicitors for the defendant: Carley & Standish, Peterborough.*

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[McRUER C.J.H.C.]

**Symerose et al. v. Chapman and The Toronto Transportation Commission.**

*Negligence—Evidence—Standard of Care Admitted by Defendant, in Instructions to Employees, as Reasonable—Admissibility of Rules and Instructions in Evidence—Discovery.*

*Street Railways—Negligence—Evidence—Company's Rules and Instructions as Admission of Standard of Care.*

*Discovery—Range of Examination—Materiality—Instructions to Company's Employees as to Precautions to Avoid Accidents.*

In an action arising out of alleged negligence in the operation of a street-car the plaintiff is entitled to have discovery of any instructions given by the street railway company to instructors of operators, and of any rules, regulations, manuals and other written documents governing the operation of street-cars and published by the company. Such documents would be admissible in evidence on the issue of the motor-man's negligence, as showing the standard of care set up by his employer as reasonable, and this being so the plaintiff is entitled to discovery and their production. *The Dublin, Wicklow, and Wexford Railway Company v. Slattery* (1878), 3 App. Cas. 1155; *Toronto Railway Company v. King et al.*, [1908] A.C. 260; *The Winnipeg Electric Street Railway Co. v. Bell* (1906), 37 S.C.R. 515, applied; *Brenner et al. v. The Toronto Railway Company* (1908), 40 S.C.R. 540; *The Ottawa Electric Railway Company v. Booth et al.* (1920), 63 S.C.R. 444, discussed.

Such documents are clearly relevant also on the issue of the company's negligence in employing an incompetent person as operator of a street-car.

AN APPEAL from an order of Conant, Senior Master.

22nd February 1949. The appeal was heard by McRUER C.J. H.C. in chambers at Toronto.

*G. A. McGillivray, K.C.*, for the defendants, appellants.

*T. J. Agar, K.C.*, and *H. H. Siegal*, for the plaintiffs, respondents.

11th March 1949. McRUER C.J.H.C.:—This is an appeal from the order of the Senior Master of the Supreme Court directing that Robert Aiken, an officer of the defendant Commission, re-attend at his own expense and answer questions 73, 79, 104, 105

and 107 put to him on his examination for discovery "and other proper questions as to instructions to instructors referred to in questions 73 and 79, if any, and as to the circumstances under which the report referred to in questions 104, 105 and 107 was made, and the nature of the said report".

Questions 73 and 79 read as follows:

"73. Now I put this question to you: Since the 1st of January, 1942, has any document in writing in the way of advice, information, regulations, rules or instructions or an instruction pamphlet been furnished by the Toronto Transportation Commission to any of its instructors of student operators in training who are learning to be motormen of the Commission?"

"79. Now you haven't answered my question. My question is, has the Toronto Transportation Commission since the 1st of January, 1942, furnished to any instructor or instructors employed by the Commission any information in writing to be used in the training of student operators?"

On the advice of counsel the witness refused to answer.

At an earlier date the defendant Chapman, who was the operator of the street-car involved in the accident, had been examined for discovery and had been asked questions pertaining to instructions he had received during his training as motorman and whether or not the instructions were in writing. These questions he refused to answer. On motion taken to the Senior Master an order was made that the questions should be answered: [1949] O.W.N. 27. Counsel advise me that on the subsequent examination it was stated that there were no instructions in writing.

The object of questions 73 and 79 is to ascertain whether there were instructions in writing relating to the training of operators given to the instructors, and whether rules governing the operation of street-cars have been published.

The argument on this appeal was addressed to the broad question whether production of manuals, rules, regulations and other documents in writing, governing the operation of street-cars, published by the defendant Commission, can be compelled as material relevant to alleged negligence in the operation of a street-car.

The statement of claim alleges that the plaintiff, while crossing from the north-east corner of Spadina Avenue and Dundas



Street to the north-west corner of the intersection, was struck by a street-car which had been proceeding westerly along Dundas Street and was turning north on Spadina Avenue.

It is alleged that the injuries sustained were due to the negligence of the defendant Chapman in the operation of the street-car and particulars of the negligence are given. Among the particulars it is stated that Chapman "was an incompetent operator and ought not to have attempted to operate the street car, and the Defendant Commission was thereby negligent in placing the said operator in the operation of the said street car".

The plaintiff also pleads the provisions of orders, rules and regulations made by the defendant Commission respecting the maintenance, use and operation of the street-car in question and alleges that the defendant Chapman operated the street-car contrary to the said orders, rules and regulations.

The allegation that the Commission was negligent in placing in charge of the operation of a street-car an operator who was incompetent and ought not to have attempted to operate the street-car, is an allegation of negligence that is quite distinct from any negligence of which Chapman might have been guilty. In the latter aspect the defendant Commission may be held vicariously liable for Chapman's negligence, while in the former the defendant Commission may be held liable for its own negligence in placing an incompetent and insufficiently trained operator in charge of a street-car. As a defence to this contention it would be quite open to the defendant Commission to give evidence of the rules and regulations laid down for the operation of street-cars and the instructions given to instructors whose duty it is to train operators in the performance of their duties. This being so, I cannot see on what principle the plaintiff can be denied discovery with respect to those instructions and their production, if in writing.

I now consider the other aspect, *viz.*, whether the instructions given to instructors, and the rules and regulations of the defendant Commission for the guidance and direction of their motor-men, are relevant to consider in deciding whether the operator was in the circumstances guilty of negligence. The relevance of such rules and regulations is well established in the well-known and oft-quoted case of *The Dublin, Wicklow, and Wexford Railway Company v. Slattery* (1878), 3 App. Cas. 1155. The finding of negligence there involved the failure to blow a whistle as the train

in question was approaching the station at which the accident happened. It was a rule of the railway company that the express train should always sound a whistle on approaching a station.

At pp. 1163-4 Lord Cairns states: "As to the necessity for whistling, *Rossiter*, the engine-driver, called for the Appellants, stated that it was his duty with express trains to whistle passing every station; and although it would, as it seems to me, be difficult to lay down an abstract rule as to the necessity of whistling, it may be taken that the orders given to the engine-drivers shewed that the Appellants considered whistling under the circumstances to be a reasonable and proper precaution, and it might have been, and I think it was, right to tell the jurors that if they found this precaution neglected on this occasion they might consider it to be evidence of negligence on the part of the Appellants."

Lord Penzance, at p. 1174, after stating that the accident might in the opinion of the jurymen have been attributed to the absence of whistling, states: "If so, it was proper to take the opinion of the jurymen on the subject, asking them, first, whether there was in fact any whistling; if not, then whether the absence of such whistling constituted a want of due and reasonable care on the part of the Defendants, regard being had to the regulations of the company and to the existence of the level crossing, used as it was for people to pass over it freely and without restraint".

Lord O'Hagan says, at pp. 1183-4: "It is surely enough that, in the particular case, the Defendants by their own conduct admitted the propriety of whistling, and accepted the duty of doing so, for the protection of their passengers and the general public. Their servants proved the orders given to whistle, at the various stations, on the passing of the express trains; and they are not now to be heard in denial of the necessity of such a practice, when they themselves established it, and led people to rely on its continuance and regularity, to their manifest risk if it should be abandoned without notice, or intermitted through neglect."

In *Toronto Railway Company v. King et al.*, [1908] A.C. 260, C.R. [1908] A.C. 326, 12 O.W.R. 40, 7 C.R.C. 408, Lord Atkinson, in deciding whether there was evidence proper to be submitted to the jury that the driver of the tramcar was guilty of negligence, quoted verbatim from Rule 58 of the company governing the

operation of street-cars at curves and crossings and intersections. It can hardly be argued that the learned Lord would have done so if the rule had been irrelevant.

In *The Winnipeg Electric Street Railway Co. v. Bell* (1906), 37 S.C.R. 515, affirming (1905) 15 Man. R. 338, 1 W.L.R. 405, the plaintiff alighted from a street-car on the side next to the parallel track, upon which another car of the company was coming at a considerable speed. A rule of the railway company was put in evidence which provided that while passing another car the speed must be slackened and the gong rung continuously until the car had passed. I have examined the evidence and the appellant's factum filed in the Supreme Court in this case and I find the following submission with reference to this rule:

"This was an extra precaution adopted by the defendants. . . . It was not shown that the plaintiff had notice of it, and even if he had, its existence would not relieve him of the duty to exercise precaution. Its existence creates no greater obligation on the part of the company and its breach, even if proven, no greater liability."

The Supreme Court did not give effect to this argument. The rule was referred to in the judgment of the Court and the learned trial judge, Mr. Justice Perdue, was upheld. In his reasons for judgment (1905), 15 Man. R. 338, he stated:

"I consider the rule in question as providing a reasonable precaution to be taken by the defendants' servants in charge of cars approaching a point of danger. Such precaution should, I think, be taken by them even in the absence of an explicit rule on the part of the company. In any event, the existence of the rule having been proved, it is evidence of what the defendants considered to be a reasonable and proper precaution to be taken by the motormen in all such circumstances."

The learned judge referred to and followed the judgment of Lord Cairns in *The Dublin, Wicklow, and Wexford Railway Company v. Slattery*, *supra*.

Counsel for the defendant relies on the judgment of Davies J. in *Brenner et al. v. The Toronto Railway Company* (1908), 40 S.C.R. 540, 8 C.R.C. 180, as establishing that rules of this character are not admissible evidence to prove negligence. In that case the rule in question was identical with the rule dealt with in *Toronto Railway Company v. King et al.*, *supra*. Davies J. at p. 542 stated: "The learned judge charged: 'It is not a question,



gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do.' That again is another way of saying the rules are not the standard to guide you to your conclusion as to the speed of the car or its control, but the determination of what was reasonable under the circumstances as proved. He may have obeyed the rule and still have been guilty of negligence. He may again have disobeyed the rule under circumstances and conditions which did not make him so guilty. The question was whether or not, under the proved facts, negligence on his part was shewn. I think this was the substance of his charge and I think it was right in law and was properly understood by the jury."

MacLennan J. held that the rule did not apply to the circumstances of the case, but I find nothing in his judgment from which it may be inferred that if the accident had happened at an intersection governed by the rule it would not have been proper to take it into consideration in determining whether negligence had been proved or not.

The judgment of Duff J., as he was then, does not deal with the point.

From a careful reading of the judgments in this case I cannot come to the conclusion that the majority of the Court intended to take any different view of the law than that indicated in the other cases with which I have dealt, and on a close reading of the judgment of Davies J. it does not appear to go further than holding that proof of a breach of the rules of the company does not necessarily establish negligence, but they may nevertheless be taken into consideration in arriving at a conclusion as to whether the defendant's servant acted with reasonable care in the circumstances.

In *The Ottawa Electric Railway Company v. Booth et al.* (1920), 63 S.C.R. 444, 60 D.L.R. 80, 29 C.R.C. 4, the jury found the defendants guilty of negligence causing the accident and that such negligence consisted in "omittance of sounding gong and car travelling at excessive speed at crossing". Under the statutory rule in force at that time each car was required to be supplied with a gong which was to be sounded when the car was approaching within 50 feet of a crossing. There was no requirement that the gong should be sounded continuously until the crossing was passed. By one of the company's rules and regulations for the government of its employees, the motorman was required to

sound the gong on approaching a street crossing, at least 25 yards therefrom, and to continue such sounding until the crossing was passed, as a warning to the public who might be walking or driving on, or dangerously close to, the company's tracks. Duff J., at pp. 454-5, in pointing out that the trial judge in his charge had directed the attention of the jury to the question whether the victim was misled by the fact that the gong was not sounded, into thinking that the line on that side was clear, states:

"That was no doubt a proper point for the jury to consider but I am inclined to think, having regard to the evidence as a whole, it was not the precise point of fact on which the jury ought to have considered the case to turn. That question was, I think, to adopt the language of Lord Cairns in *Slattery's Case* at page 1167, whether the failure to sound the gong coupled with the excessive speed of the car on the one hand or, on the other hand, the want of reasonable care on the part of the deceased, was the *causa causans* of the accident."

I see nothing in any of the judgments that would warrant the conclusion that the rule of the company, as distinct from the statutory rule, with reference to the sounding of the gong ought not to have been taken into consideration in arriving at a conclusion as to whether there was negligence in the particular case.

If there are instructions given to instructors for the purpose of training operators in their duties and rules and regulations of the defendant Commission which would apply to the circumstances of the accident alleged in the pleadings, I do not see how a trial judge could, on the authority of these cases, refuse to admit them in evidence; that being so I cannot find that the defendant is warranted in failing to make discovery thereof.

This disposes of questions 73 and 79.

Questions 104, 105 and 107 read as follows:

"104. Q. Now if a street-car of the defendant Commission is involved in an accident, is it the duty of the motorman, regardless of the question as to whether or not there was any negligence on his part or on the part of the Commission, obligated to make a report in writing of that accident? A. Emphatically yes."

"105. Q. And regardless of the question as to whether the accident was or was not caused by negligence on the part of the Commission or of the motorman, is it his duty to secure if possible the names and addresses of certain witnesses?" This question the witness declined to answer on the advice of counsel.

"107. Q. Now is it in the course of his duty as a motorman when an accident occurs of which he has knowledge, regardless of the question or absence of negligence, to make such a report in writing? MR. MCGILLIVRAY: He said yes in the previous question. A. I think I answered that before."

The formal order of the learned Senior Master, taken with his reasons, is somewhat obscure. There is a direction that questions 104 and 107 should be answered. These are the questions that deal with the report and they were answered. There were no other questions put by the examining counsel as to the circumstances under which the report was made or its nature. It is quite clear from his reasons that the learned Senior Master was not intending to make an order that the report should be produced. He states: "From perusal of the many authorities cited by counsel it is manifest that there should be evidence before the Court as to the existence and nature of the report and the circumstances under which the report, if any, was made before deciding whether it should be produced."

As I read the examination there were no questions put to the witness which he declined to answer that come within this description. Question 105, which is the only question the witness declined to answer, deals with the duty of the motorman to secure the names and addresses of witnesses. It was suggested on the argument that counsel might agree that I should decide the question on this motion as to whether production of the report referred to in question 104 should be ordered. Counsel for the appellant stated that he was not prepared to argue that question on this motion and hence I am not in a position to deal with it.

While question 105 deals with the duty of the motorman to secure names of witnesses, and there is abundant authority that disclosure of the names of witnesses a party proposes to call may not be ordered, the question does not go so far as to transgress any rule. I am not prepared to overrule the learned Master's decision on this point.

The appeal will be dismissed with costs to the plaintiffs in the cause.

*Appeal dismissed.*

*Solicitor for the plaintiffs, respondents: Harold H. Siegal, Toronto.*

*Solicitor for the defendants, appellants: Irving S. Fairty, Toronto.*



[URQUHART J.]

Re Rubin Enterprises Limited.

*War Pensions and Gratuities—Re-establishment Credit—Nature of Veterans' Rights—Effect of Payment by Crown to Merchant—Non-delivery of Goods Paid for—Bankruptcy of Merchant—The War Service Grants Act, 1944 (Dom.), c. 51, as amended.*

Where a cheque is sent by the Crown authorities to a merchant in payment for goods sold to a veteran, by way of re-establishment credit in pursuance of The War Service Grants Act, there is an implied condition that the goods shall be immediately delivered to the veteran buyer, but the proceeds of the cheque are not impressed with any trust in consequence of this condition, nor is the merchant in any sense the agent of the Crown. If the merchant is declared bankrupt without having delivered the goods to the buyer, the Crown is not a creditor of his estate. The buyer will be a creditor for the value of the goods undelivered.

A MOTION by a trustee for directions.

1st March 1949. The motion was heard by URQUHART J., as Judge in Bankruptcy, at Toronto.

*L. E. Schacter*, for the trustee.

14th March 1949. URQUHART J.: Motion by the trustee for directions in relation to the sum of \$1,438.55 paid by His Majesty The King in the right of Canada, as represented by the Minister of Veterans Affairs, to Rubin Enterprises Limited, the debtor, which was adjudged bankrupt by the Court on the 18th June 1948.

The question involved is: Is the Crown in the right of Canada a creditor in respect of the above sum and, if not, is there a trust in favour of the Crown established in respect of the above-mentioned moneys?

Notice of the application was served upon the Department and upon five soldiers, whose transactions with the debtor were involved, but no one except the trustee appeared upon the return of the motion.

Although at the outset the motion sought a direction as to service of notice of the substantive motion, yet, it appearing that all parties interested had been served, the motion resolved itself into the motion for directions. The Department of Veterans Affairs has been kept fully in touch with the progress of the matter and was aware of the course that the argument had taken, but did not appear at any stage. I see no reason why I should not dispose of the substantive motion.

I would have been glad to have had some argument on behalf of the Department, and adjourned the matter in order that its advisers might appear, but they did not do so.

The debtor was in the furniture business in a large way in the city of Ottawa, and the present claims arise out of five separate transactions of a similar nature conducted by each of five veterans with the debtor.

Each veteran of the war just concluded is entitled to receive from the Government, in addition to his gratuity, a further sum, called a re-establishment credit, to assist him in establishing and furnishing a home, if he has not taken such allowance for education, the purchase of land, or one of a number of other options open to the veteran.

The procedure under which the veteran takes advantage of his re-establishment credit is as follows: He goes to the place of business of, in this case, a furniture company, and negotiates for the purchase of furniture, paying a deposit down, and receiving from the merchant an invoice containing an itemized statement of the goods purchased and the amount paid for each item. The invoice also shows the amount paid in cash by the veteran. The veteran then goes to the proper office of the Department of Veterans Affairs in his district, produces his invoice and the receipt above referred to, and completes an application for re-establishment credit on Form D.V.A. 152. In due course the authority to pay the required amount is made out by the Re-establishment Credit Division and directed to the District Treasury Office. The District Treasury Office then issues a cheque payable to the merchant and forwards it to the merchant pursuant to the terms of the application. The usual practice is for the Department to send a covering letter with the cheque, in the following terms, namely:

“DEPARTMENT OF VETERANS AFFAIRS.

Re-establishment Credit Division.

Aylmer Building,  
13 Slater Street,  
Ottawa, Ontario.

“Attached hereto please find cheque in the amount of \$  
which is tendered under the following conditions:

"(1) That the 10 per cent. cash down-payment has been received by you from the Veteran;

"(2) That the cheque is accepted in full payment of the merchandise as shown on your account dated                      in the amount of \$                      .

"(3) That delivery of the goods as set out in the aforementioned account will be made immediately to the address as shown on the account;

"(4) That no deviation from the items shown in the account will be made;

"(5) That the cheque will be returned immediately if the above conditions cannot be carried out.

Yours very truly,

for Superintendent of Veterans  
Welfare Services,

Enc.

'OT' District, D.V.A."

However, it was the practice in district offices where merchants were well and favourably known to the Re-establishment Credit Division staff to forward the cheque to them without an accompanying letter. In two of the cases hereafter referred to, that is, those of Banning and Chappell, no accompanying letter was sent, although such a letter was sent in connection with each of the other three cases.

When the matter was first presented to me it was presented in a very simple form, as set out in the affidavit of one Chappell, one of the veterans, which was said to be a typical case. Chappell was a member of the forces in the last war and as a result of his service became entitled to gratuities under The War Service Grants Act, 1944 (Dom.), c. 51. He went to the debtor's place of business to buy a radio and was shown a sample radio on the floor, and was informed that similar stocks were in possession of the debtor. He then agreed to buy a radio according to the sample for the price of \$99.50, and paid a deposit of \$9.95, being the 10 per cent. of the purchase price required to be advanced by the veteran under the Act. He then made a formal application to the Department of Veterans Affairs on certain forms provided by the Department, and a cheque for \$89.55, the balance of the purchase price, was forwarded by the Department of Veterans Affairs to the debtor but without, in this case, any accompanying



letter, and a receipt for this cheque was secured from the debtor and returned to the veteran. Delivery of the radio was not made, and Chappell has filed a claim as creditor, claiming that a trust was set up for him.

When the motion first came before me, I assumed, from the documentary evidence before me, that the Chappell case, above outlined, was a typical one. However, some time later, having read in the press that certain officers of the debtor and several veterans were being prosecuted for irregularities in connection with the administration of the Act, I adjourned the hearing and although none of the veterans concerned has been prosecuted, I directed that such veterans should be orally examined if their cases showed any material difference in facts from that of Chappell. As a result, the trustee had the claimants Boileau, St. Jean, Banning, and Turner examined, and their examinations have been put in evidence.

Boileau, like Chappell, is a veteran, and was entitled to a re-establishment credit. About 15th March 1948 he went to the debtor and put in an order for a refrigerator but did not pay anything down as required by the regulations. He arranged to pay the 10 per cent. down payment on delivery. The Department of Veterans Affairs was billed for \$301.45, which it paid by a cheque in the usual manner. The letter set out above accompanied the cheque. Boileau did not get the refrigerator and went down to the debtor's place of business and got a cheque for the last-mentioned amount payable to the Receiver General and took it to the Department. A clerk in the Department, noticing that the cheque was unmarked, sent it back to the debtor, and the debtor failed to return it, and that was the last that was heard of it.

The contract between Boileau and the debtor is irregular in that whereas Boileau really wanted a refrigerator, he ordered a Chesterfield suite and a rug. Under the regulations he knew he could not get a refrigerator, as he already had one. The refrigerator which he had had broken down and he wanted another, and so he entered into the above subterfuge with the debtor to get one.

He had no delivery of any goods, nor had he picked out any specific goods, nor were any goods set aside for him. He made no payment of any sort. I asked the trustee to have Boileau make an affidavit in the matter, but he declined to do so, fearing prose-

cution, I suppose. From his examination I would draw the conclusion that he was very reluctant to admit the above facts.

St. Jean, another veteran claimant, was also entitled to the aforesaid credit. He had used up part of his grant by the purchase of a washing-machine. Then he went to the debtor and bought a refrigerator for \$339, paying \$33.90 thereon. The Department was billed in the usual manner on 15th March 1948, and about 24th March 1948 they sent the above-quoted letter with a cheque for \$305.10, the balance of the purchase price. St. Jean made several attempts to get his refrigerator but was put off with the excuse that the debtor was awaiting arrival of stock. About 14th May 1948 he cancelled the order and got back a cheque for \$33.90 advanced by him, the debtor promising to return the money advanced by the Government forthwith to the Government. He then took the debtor's cheque to a grocery store, and cashed it. The cheque, however, was returned "N.S.F." but was later cashed by the debtor. The cheque for \$305.10 was never sent by the debtor to the Department, and St. Jean never received the refrigerator. But again I conclude that no specific refrigerator was picked out by him or appropriated to the contract by the debtor.

Banning, another claimant, is also entitled to the aforesaid credit. He had a friend in the employ of the debtor and requested the friend to look out for a refrigerator for him. About 1st December 1947 the friend advised him by telephone that they had some "koolerators", and Banning agreed to purchase one for \$309. On the advice of his friend he did not advance the required 10 per cent., as the friend, apparently, had the option of reducing the price to that extent. He applied to the Department for his credit in the usual way, and the latter paid \$275, but without a letter accompanying the cheque. Banning received the koolerator and kept it for several months but found it unsatisfactory. In March 1948 the debtor agreed to take it back, to sell it, and to credit him with the proceeds, after deducting a commission for the sale. They sold the koolerator and gave Banning a credit note for \$275. Later on, in April, Banning again spoke to his friend, and ordered a bedroom suite for \$339 for delivery on 1st January, but finding that he could not get the quarters that he wanted he cancelled the order. In the meantime, he had secured, in the ordinary way, \$64.50 more from the Department of Veterans

Affairs. After cancelling the order he requested the debtor to return the two sums, namely, \$275 and \$64.50, to the Department of Veterans Affairs. Banning says that he saw a letter returning this amount to the Department, but apparently it was never received. In between the two sales, namely, in January 1948, he also bought from the debtor a folding bed for \$15.95, paying no cash therefor and receiving a credit for the above amount from the Department, but the bed was delivered, and the veteran still has it.

Turner is another claimant, and similarly entitled, although he is still in the Air Force. In September 1947 he bought a table and four chairs, and the Department, on 25th September 1947, paid \$66.87 in the usual manner. Turner paid the required 10 per cent. and got the goods, and no claim is made therefor. On 12th March 1948 he purchased a washing-machine, a refrigerator, and an ottoman, for a total of \$593, and gave a deposit of \$15, agreeing to pay a balance of \$78 in instalments of \$10 per month each. He paid five of these monthly instalments. The bill made out to the Department shows a payment of \$93 made by the veteran to the debtor, which is incorrect. The Department paid to the debtor \$500 (I presume the limit of credit to which the veteran was still entitled), and the usual form letter accompanied such payment.

About 1st April the veteran received all the articles except the refrigerator, which had been priced at \$338. He never received this. His wife went to enquire several times, and around the end of June (*i.e.*, after the bankruptcy) he cancelled the order. About the middle of July, finding that the chair and the ottoman did not match, he arranged with the debtor to have the ottoman made to match, and so he took it in for that purpose. Later a representative of the debtor came to him and took away the chair, telling him they would give him a refund, which he has not received.

In this case, as in all of the other cases, no specific goods were selected by the veteran and, except as shown to have been delivered as above, no goods were appropriated to the contract by the debtor.

When each veteran went to the appropriate officer of the Department and produced his invoice and the receipt for payment of the deposit, he applied in writing on a form furnished by the Department for such credit. This form sets out a great many



details as to his name, his discharge number, and other matters of a formal nature. At the end of the form there is this request which the veteran signs: "I request that cheque for \$        on my behalf be made payable to Rubin Enterprises Ltd. for the purpose described." The moneys received from the above transactions by the debtor were not earmarked in any way, but went into the general coffers of the company, and so the rights of the general creditors would have to be considered.

The right of the veteran to receive the re-establishment credit arises, as I have said, out of The War Service Grants Act, 1944, and the amending Acts. Part II of the Act has as its general heading the words "RE-ESTABLISHMENT CREDIT". Section 7 as re-enacted by 1946, c. 74, s. 3, provides that every veteran who has not taken certain other options to assist in his re-establishment shall be eligible, in addition to his gratuity, for a re-establishment credit in a certain amount determined by the length and nature of his service in the war.

No clear definition is provided by the Act for the word "credit". The word "credit" has many meanings. I am of opinion that the word is used in this Act in the book-keeping sense. It represents a sum of money due to some person or standing on the creditor's side of his account.

The credit seems by the Act to be made "available" to the veteran: ss. 7A(3)(4), as enacted by 1946, c. 74, s. 4; 8, as enacted by 1945, c. 38, s. 8; 9(1)(2), as re-enacted by 1945, c. 38, s. 9. Some stress is laid by the Department on the use of the word "available" in the latter sections and in s. 10 as re-enacted by 1946, c. 74, s. 6. I cannot see, however, that that assists the Government in any way. The purposes for which the re-establishment credit is made available are set out in detail in s. 9, and the purchase of household furniture is one of these purposes.

The effect of the Act is that the Government is offering to set up an entry on its books in favour of the soldier. By the Act the credit for re-establishment is made "available" for the soldier, *i.e.*, it is there for him, and he can take it, or he can leave it, as he sees fit. If he does not elect to take it within a certain time his right expires.

The word "available" also has a number of meanings, but I am of opinion that in this Act, the word means obtainable or at one's disposal, most likely the latter.

In regard to the credit for household furniture (such as is involved in this case) it is contemplated by s. 9(2) that actual possession of the articles purchased shall, after the payment is made by the Government, pass to the buyer. The credit is available for outright sale only, the section being designed to prevent the advance of Government money in respect of contracts made by the veteran which are not fully paid up. By s. 14 of the Act the grant of any credit can only be made on the application of or on behalf of the soldier claiming it. The Minister is to prescribe regulations concerning the applications.

By s. 20, as re-enacted by 1945, c. 38, s. 14, it is provided that the credit cannot be attached or assigned.

Regulations have been made under the Act, and these contemplate an application in certain terms which appear to have been complied with in each of the five cases mentioned above. They also contemplate that when the Minister makes a payment to a dealer, for example, the latter shall furnish a receipt to the veteran on whose behalf the payment is made. Everything in the Act and regulations seems to indicate the intention of the Government to allow a veteran full right of choice and freedom of action within the Act and regulations, and that once the money is advanced the Government will have no further claim upon it. The books are balanced, so to speak. The credit has been made available. That is, it is entered on the creditor's side, and when the payment is made such payment is entered upon the other side of the ledger against the credit, and the books are balanced. So far as I can see, there is no lien or "string" attached to the grant once it has been made which would give the Government a claim upon it under such circumstances as we have here, unless (A) s. 9(2) comes to the Government's aid, or (B) a trust is created.

Section 9(2) reads: "No credit shall be made available for the purpose of furniture or household equipment or for the payment of any debts incurred by the purchase of furniture or household equipment if the actual possession of the furniture or household equipment does not pass to the buyer when the contract is made or if it is agreed, provided or conditioned in the contract that the right of property in or right of possession to the furniture or household equipment in whole or in part shall remain in the seller notwithstanding that the actual possession of the furniture or household equipment passes to the buyer."

This section contemplates a contract in which actual possession shall go to the buyer when the contract is made. I do not think its interpretation would justify me in going to the length of finding that in a case such as this the Crown would become the creditor or that the moneys advanced were impressed with a trust merely because of this section. I am of opinion that the intention of the section is to prevent moneys being advanced against instalment purchases or hire-receipt transactions where the soldier might ultimately lose the goods by reason of forfeiture from future non-payments.

The second alternative is: Does the wording of the covering letter referred to above, especially the last paragraph thereof, create a trust in favour of the Crown? This may come into play if consideration (A) above outlined does not.

Under s. 23(i) of The Bankruptcy Act, R.S.C. 1927, c. 11, the property of the debtor divisible amongst its creditors does not include property held by the debtor in trust for any other person.

To return to the letter above set forth, it will be noted that the money is advanced upon several conditions, *e.g.*, the payment of the 10 per cent., the immediate delivery of the goods ordered without deviation and the return of the cheque forthwith if the said conditions cannot be carried out.

While the letter contemplated that the cheque would be returned if immediate delivery were not made, for example, there was nothing done to prevent the debtor from cashing the cheque and mixing the proceeds with its own funds, if any, if a consignment of refrigerators were on order and there were some delay, as might be expected under post-war conditions, in securing them.

The letter is also obviously a form letter, and I would think that little attention would be paid to it by the debtor or by any merchant who was handling, as the debtor was, a great many of these transactions, some with, and some without, form letters.

The way the matter was handled by the Department would seem to invite just what happened in these cases.

I doubt, also, if the letter in itself would impose upon the debtor, without its consent, a trust, under the circumstances, to hold the cheque until the merchandise was received and delivered. The debtor would need, and might be presumed to need, money in its daily affairs, and in each case the cheque was cashed and the money was used in the business, with the result that it cannot now be followed.



Even if a fiduciary relationship of sorts could be said to have been created either by the dealing with the Department or by the aforesaid letter, once the moneys represented by the proceeds of the cheques had been mixed with other moneys of the debtor, and the mass used in carrying on the ordinary business of the latter, that relationship would have been lost upon the principles set forth in the leading case of *Sinclair v. Brougham*, [1914] A.C. 398, where Viscount Haldane L.C. said at pp. 418-9:

"The difficulty of establishing a title in rem in this case arises from the apparent difficulty of following money. In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease ipso facto to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognizes as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. It would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title.

"But the exception is not extended beyond the limits which necessity imposes. If money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered in specie. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money. This is a principle not merely of equity, but of the common law. It is explained in the judgment of Lord Ellenborough in *Taylor v. Plumer* (1815), 3 M. & S. 562 [105 E.R. 721], who pointed out that there was no reason why the doctrine that money could not be followed should apply to circumstances in which a broker had wrongfully invested money of his principal in purchasing securities into which it could be traced. The reason of this is plain. The broker could not in these circumstances set up as against his principal the rule which applies to what has been paid over as currency, that ordinarily transfer of possession is transfer of property. So long as the money which the principal has handed to his agent to be applied specifically, and not on a debtor and creditor account, can be traced into what has been procured with it, the principal can waive his right of action for damages for tort, and, affirming the

proceeding of the broker, claim that his money is invested in a specific thing, which is his. But Lord Ellenborough laid down, as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client, the broker, which precluded the notion of following the money."

See also: *Harris v. Truman et al.* (1881), 7 Q.B.D. 340, affirmed (1882), 9 Q.B.D. 264; *Ex parte Dumas* (1754), 2 Ves. Sen. 582, 28 E.R. 372; *In re The Trustee Act*; *In re Trusteeship of Jackson re J. E. Muir & Company Limited*, [1935] 1 W.W.R. 72, 16 C.B.R. 181; *In re Smith*; *Ex parte Vancise*, 15 Sask. L.R. 19, [1922] 1 W.W.R. 283, 63 D.L.R. 359; *Taylor et al. v. Plumer* (1815), 3 M. & S. 562, 105 E.R. 721. In all of these cases the securities, chattels, or even the money, could be easily ascertained and set aside.

The reasons of Viscount Haldane, quoted above, refer with approval to those of Lord Ellenborough C.J. in *Taylor et al. v. Plumer*, *supra*, at p. 574. While the words there used by the learned Chief Justice seem at first blush to go farther than those above quoted, it will be seen that the general words used about the middle of p. 574 do not actually detract from the two principles underlying the establishment of a trust, *viz.*: (1) that the property of a principal entrusted by him to an agent belongs to the principal notwithstanding any change it has undergone in form so long as such property is capable of being identified and distinguished from all other property, and (2) that all such property is recoverable from the assignees of the agent in the event of his becoming bankrupt just as it was from the agent before bankruptcy.

Another argument of counsel for the trustee herein was that the debtor became the agent of the Crown, and that the principles laid down in *Carter v. Long & Bisby* (1896), 26 S.C.R. 430, might apply. That case, however, presents quite a different situation, as a clear case of agency was shown. Moneys had been entrusted to the assignor to buy wool for the creditor. The assignor bought wool, but assigned before delivery was made. Nothing like that situation occurred here.

The last-mentioned case was followed in British Columbia in *In re R. P. Clark & Company (Vancouver) Limited*, 44 B.C.R. 301,

13 C.B.R. 118, [1931] 3 W.W.R. 79, a case where a stockbroker's firm had become bankrupt, and also in Nova Scotia in *Johnson v. Logan* (1899), 32 N.S.R. 28, a case where goods had actually been appropriated to the contract. To my mind neither of these cases is helpful in that the circumstances in the present case are entirely different from those in the cases just above cited. In no case here was there either an appropriation of goods or a separation of the moneys which were mixed with those coming from other non-Government transactions. Consequently, cases such as *Ogilvie Flour Mills Company, Limited v. Canadian Credit Men's Trust Association, Limited*, 20 Sask. L.R. 104, 7 C.B.R. 31, [1925] 3 W.W.R. 586, [1925] 4 D.L.R. 969 (*sub nom. Re Rostron*), would not apply.

The question submitted will be answered by a declaration that the Crown in the right of Canada is not a creditor, nor has any trust been established giving the Crown the right to payment of the moneys advanced by it and above referred to.

Dealing with the case of each veteran: There is nothing in the Chappell case, where the procedure was regular, to make me alter the above opinion. Chappell, and not the Crown, is the creditor. No letter was written, and so the argument presented with respect to the letter cannot apply.

In Boileau's case, although what took place was very irregular, he again is the creditor, and the Crown's case is weakened by the possibility that if the cheque returned had been deposited it might have been paid.

In Banning's case no letter was sent. In addition, he received the very goods which were paid for, and his subsequent dealings were his own affair, so far as the coolerator is concerned (\$275); the \$64.50 advance offers no variation from the general rule.

In Turner's case, he received everything but the refrigerator, and the usual letter was sent. The subsequent dealings with the chair and the ottoman were on his own account. If they occurred, as they appear to me to have done, after the bankruptcy, then the trustee should pay him the value thereof, as he appears to be clearly entitled, but if before, then other considerations might prevail.

The trustee asks for directions. From the evidence before me the veteran in each case is the creditor, in my opinion. Whether he is a preferred creditor or not cannot be decided on the evidence before me, nor should it be upon the very doubtful notice served upon him. The trustee will have to determine in each case whe-



ther the veteran has claimed as a preferred creditor and, if so, whether to contest his claim as such. On the hearing there seemed to be only five veterans involved. However, since that time a further affidavit has been filed in which reference is made to a sixth veteran, Donald Ursu by name. His case seems to be similar to the case of Chappell, above mentioned, except this: that he is believed to have received a cheque from the estate by way of dividend in the sum of \$21.89. The case should be dealt with in the same way as Chappell's.

The result, which I regret, is that the Act is, in a sense, defeated by the distribution of cash by the trustee to the veteran if any dividend is paid, but this cannot be avoided, and I do not think that that fact, in itself, can affect the decision herein. It is not the working of the Act but the failure of the debtor which defeats the intention of the Act. Furthermore, where the Crown is held to be a creditor in bankruptcy cases, as was pointed out by Masten J.A. in *Re D. Moore Co. Ltd.*, 61 O.L.R. 434 at 450, 8 C.B.R. 479, [1928] 1 D.L.R. 383: "... the prerogative [of priority of payment] has now been reduced and limited, by the combined effect of secs. 86 and 51, subsec. 6 [now ss. 188 and 125 respectively], of the Bankruptcy Act, to a right of priority for taxes in the distribution of assets by the trustee in bankruptcy. In other words, the Crown's original prerogative right at common law is preserved in a reduced and limited form by the Bankruptcy Act."

So if the Crown were the creditor, it would only be an ordinary creditor, ranking *pari passu* with all other creditors. This situation would produce a curious result that the Crown would receive a dividend (if any) of so many cents on the dollar of its claim, and the veteran in each case, who has had his credit advanced, would still be entitled to the full amount of his credit.

But as I have said, the Crown is neither a creditor nor a *cestui que trust*, but the veteran is the creditor, but what sort of a creditor remains to be determined.

Judgment in accordance with the terms of these reasons. The trustee will be paid his costs of this application, including the costs of the examinations aforesaid, upon a solicitor and client basis, because of the amount of work to which the solicitor of the trustee was put by reason of the peculiar circumstances of each of the five cases involved.

*Judgment accordingly.*

*Solicitor for the trustee, applicant: Leo E. Schacter, Toronto.*

[McRUER C.J.H.C.]

**Rex v. St. Lawrence.**

*Evidence—Confessions—Finding of Articles in Consequence of Inadmissible Confession—What Parts of Statement Admissible in Evidence.*

Where articles are found by the police as a result of information contained in a statement made by a person in custody in such circumstances that the statement is not admissible in evidence as a voluntary confession, evidence may be given of the finding of the articles, and evidence is also admissible of such parts of the statement as are confirmed by that finding. Thus, the Crown may prove that the accused told the police where to find the articles, since the finding establishes that the accused knew where the articles were, but it may not prove that the accused said he had put the articles there, because the finding of them does not establish that fact, but is equally consistent with his knowledge that the articles had been placed there by someone else.

*Evidence—Previous Statement of Witness—Admissibility to Re-establish Witness's Credit after Cross-examination Directed to Showing that Evidence Fabricated.*

One P, giving evidence on a trial for murder, swore that he had seen the accused at the scene of the crime at about the time it was committed. Counsel for the defence, in cross-examination, elicited the information that P, in a statement made to the police on the day after the murder, had denied all knowledge of it, and that he did not disclose his information to them until after the appearance of a story in the newspapers indicating that P might himself be suspected of complicity. The Crown then tendered the evidence of one M, to prove that P, on the night of the murder, had told M that he had seen the accused running away.

*Held*, M's evidence was admissible, not as proof of the facts told by P to him, but to show the consistency of P's story, and to rebut the suggestion that his evidence was a fabrication, invented for the purpose of diverting suspicion from himself. It must be confined within the narrowest compass possible to make it intelligible, and should be limited to the story connecting the accused with the scene; it must not be a general version of what P said to M about the incident.

RULINGS on the admissibility of evidence, in the course of a trial for murder.

31st January and 1st and 2nd February 1949. The accused was tried by McRUER C.J.H.C. and a jury at Toronto.

W. O. Gibson, K.C., for the Crown.

G. S. P. Ferguson, for the accused.

1st February 1949. McRUER C.J.H.C. (orally):—The witness Parrington has given evidence that on Saturday night, 9th October, he saw the accused run across his path as he approached the place where he found the deceased man lying in a dying condition. The evidence of one McNaughton is tendered to show that within a short time after the discovery of the crime Parrington told him that he had seen the accused running away from the scene.

I will deal first with the principles of law governing evidence of this character.

Phipson on Evidence, 8th ed. 1942, at p. 480, states the general rule as follows:

"With regard, however, to statements made out of court, but not admissible *per se*, special considerations apply. Thus, formerly, the fact that a witness had made a previous statement similar to his testimony in Court could always be proved to confirm his testimony. But afterwards the rule was changed, and such evidence is now generally inadmissible either on direct examination of the witness himself, to confirm his testimony, or on re-examination to re-establish his credit when impeached by proof of a previous contradictory statement, or when proved from the mouths of other witnesses."

The learned author then deals with exceptions to this rule as follows:

"Such statements are, however, receivable in the cases mentioned below, not to prove the truth of the facts asserted, but merely to show that the witness is consistent with himself: (1) where the witness is charged with having recently fabricated the story, *e.g.*, from some motive of interest or friendship, it may be shown both by the witness himself and the person to whom it was addressed, that he had made a similar statement before such motive existed."

*Reg. v. Coll* (1889), 24 L.R. Ir. 522; *Reg. v. Coyle* (1855), 7 Cox C.C. 74; *Rex v. Benjamin* (1913), 8 Cr. App. R. 146; and *Flanagan v. Fahy*, [1918] 2 I.R. 361, are quoted as authority for this statement of the principle.

Taylor on Evidence, 12th ed. 1931, at p. 940, deals with the same subject in para. 1474:

"If, too, upon cross-examination of a witness, counsel, by referring to what such witness has deposed when, on a previous occasion, giving an account or no account of a transaction, suggests as a reason for disbelieving the witness's present evidence that on the previous occasion he omitted the name of the prisoner at present on his trial, the witness thus impeached may, without the deposition on the previous occasion being put in, state that when giving evidence on the previous occasion just referred to, he did give the same account of the transaction as he had just given, and did mention the name of the prisoner at present upon his trial." And again *Reg. v. Coll*, *supra*, is quoted.



Although two of the cases relied on by the text-book writers are cases from the Irish Courts, they are recognized by English decision as authoritative statements of the law.

In *Reg. v. Coll, supra*, the subject is exhaustively discussed and there is nothing to be achieved by referring to all the passages in the judgments where the principles are laid down. There is, however, one passage in the judgment of Holmes J. at p. 542 that comprehensively illustrates the proper application of the principle.

A witness had in a previous deposition given an account of the alleged crime, but had not connected Coll's name with it, and on cross-examination this was emphasized. The Crown then tendered in evidence an earlier statement made by the witness in which he mentioned Coll as being present at and taking part in the alleged crime. Mr. Justice Holmes says, after referring to this portion of the evidence:

"Now, this is consistent with a casual omission, arising from momentary oversight, or with the view that the witness had afterwards invented the charge against Coll, under the influence of some wicked motive. I presume that if the cross-examining counsel had expressed this imputation in a direct question the witness would not merely have been at liberty to deny it, but also to have shown that it was not the true inference to be drawn from the passage in the deposition, by proving that he had previously told how Coll was a party to the attack. But skilful counsel do not always deal in direct imputation. The same effect can be produced in even a more striking way by delicate suggestion. The cross-examination of the previous day; the renewal of it on the apparent inconsistency, the three questions that followed, and the subsequent attempt to show that the witness, when before the magistrates, had shaped his evidence in accordance with the suggestions of others, all taken together, convey as clearly as any language could, that Varilly had, subsequently to the month of March, fabricated the story about Coll. This was the opinion of the Judge, who had the opportunity of hearing and seeing all that happened at the trial; and it is impossible for me to come to any other conclusion. This being so, I am of the opinion that the evidence to show that Varilly had made the charge against Coll at an earlier date was clearly legitimate."

In *Flanagan v. Fahy, supra*, it is stated in the judgment of Madden J. that the general principle on which all members of the court were agreed was clearly stated in Taylor on Evidence, para. 1476, which reads as follows:

"But evidence that he has on other occasions made statements similar to what he has testified to in the cause is not admissible, unless he be charged with a design to misrepresent, in consequence of his relation to the party, or to the cause, in which case it may be proper to show that he has made a similar statement before that relation existed."

In *Rex v. Benjamin, supra*, Lord Alverstone, at p. 148, adopts the language I have quoted from para. 1474 of Taylor on Evidence. In that case a document prepared by the witness was allowed in as evidence to show that his testimony at the trial was not an afterthought.

The same matter was dealt with in *Reg. v. Coyle, supra*. The report of this case is a meagre one but an observation of Erle J. at p. 75 comprehends the whole rule: "The point is to prevent the observation that the witness has now invented the story."

I now apply the law to the case before me. The crime was committed on Saturday night. The witness Parrington was cross-examined at considerable length to show that when the police interviewed him on Sunday he denied knowing anything about it. On Monday an item appeared in the morning paper indicating that the accused, who had been detained for questioning, had been released, and stating that one Cox had told the police that he had seen Parrington leaning over the deceased. Counsel for the accused asked Parrington a question of this character: "Why did you change your tune?" and directed the witness's attention to the item that had appeared in the morning newspaper and suggested to him that he had become afraid that the crime might be "pinned on him". He then put to the witness the question: "Then you thought you had better tell a different story?" A portion of the transcript of the evidence given at the preliminary hearing was read and the witness was asked to state whether he had been asked these questions and made these answers. The important ones read as follows: "Q. You became frightened they might pin it on you? A. That is right. Q. It was then you decided the man running across that distance was St. Lawrence. Is that right? A. That is right."

It is clear to me that the cross-examination was intended to suggest that the witness did not have it in his mind until Monday that the accused man was the man he saw on the night of the crime, and that his failure to identify him with the crime earlier, or to acknowledge that he had seen him at or near the scene of the crime, was because such was not the fact, and the story was a fabrication.

I think if the case were left in its present position it would be clearly open to argue to the jury that Parrington's story, in so far as it implicated the accused, was an afterthought and concocted for the purpose of shielding himself.

The evidence is admissible, not as proof of the facts stated but merely as proof that the witness connected the accused with the crime on Saturday night, notwithstanding that he did not disclose this information to the police when interviewed on Sunday.

I shall be careful in my charge to the jury to emphasize the limited application of the evidence.

I think the evidence should be confined within the narrowest compass possible to make it intelligible, that is, to the story connecting the accused with the scene where the injured man was found, and not a general version of what the witness said about the incidents of the night.

*Evidence admitted.*

2nd February 1949. McRuer C.J.H.C. (orally):—Following Parrington's statement to the police the accused was taken into custody and on being questioned he made a statement under circumstances that would render it inadmissible in evidence. In the statement the accused gave an account of the disposition of a "twitch" and the deceased man's wallet, together with an admission that he had given a sum of money to one Pete Hylinsky on the night in question with the request to lock it up for him. As a result of these admissions he was taken to a point not far distant from the scene of the crime where a high wire fence separated the Woodbine race-track grounds from a marsh covered with underbrush. Here he pointed out where he had thrown the twitch and the wallet. On searching the locality a twitch similar to one used in the stables where the accused was employed, and a wallet similar to that carried by the deceased, together with a liquor permit bearing his name, were found.



The theory of the Crown is that the accused used the twitch to beat the deceased to death, that he subsequently robbed him, and that to avoid detection he threw the twitch, wallet and liquor permit into the marsh and gave the money to Hylinsky.

The matter involved in considering the admissibility of the evidence tendered by the Crown is one of great difficulty, and one on which there is no unanimity of opinion among judges or text-book writers.

Phipson on Evidence, 8th ed. 1942, p. 255, deals with it in this way:

"Facts and documents disclosed in consequence of an inadmissible confession are receivable if relevant. And where property has been discovered or delivered up in this way so much of the confession as strictly relates thereto will be admissible, for these portions at least cannot be untrue; but independent statements not qualifying or explaining the fact, though made at the same time, will be rejected."

The learned author does not make clear what he means by the phrase "where property has been discovered or delivered up in this way, so much of the confession as strictly relates thereto". I shall deal with this on an examination of the authorities relied upon by the author.

After referring to *Rex v. Butcher* (1798), 1 Leach 265n, 168 E.R. 235n; *Rex v. Griffin* (1809), Russ. & Ry. 151, 168 E.R. 732; *Rex v. Harris*, cited in Joy on Confessions, p. 83; and *Reg. v. Gould* (1840), 9 C. & P. 364, 173 E.R. 870, the author states: "... the earlier rule admitted the facts, but excluded the accompanying statements." In considering the authorities one must have clearly in mind what follows: "If, however, the inadmissible confession be not confirmed by the finding of the property, no proof either of the statements or acts can be received; for the influence which produces a groundless confession may equally produce groundless conduct." *Rex v. Jenkins* (1822), Russ. & Ry. 492, 168 E.R. 914, is relied on for this statement.

Taylor on Evidence, 12th ed. 1931, para. 902, states the principle and, with respect I would suggest, in more precise language:

"When, in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact,

has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement about his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement."

I pause there for a moment to emphasize that what the learned author says is that "The prisoner's statement about his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true"; that is, that the finding of the article verifies the knowledge of the prisoner that the article was there, and that what he may have said with respect to his knowledge could not have been fabricated in consequence of the inducement. The learned author goes on:

"It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found, *but it would not, in such a case of a confession improperly obtained, be competent to inquire whether he confessed that he had concealed it there.* So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false." (The italics are mine.)

In Archbold, Criminal Pleading, Evidence & Practice, 31st ed. 1943, pp. 375-6, it is stated:

"Although a confession for the above or any other reasons may not be receivable in evidence, yet any discovery that takes place in consequence of such confession or any act done by the prisoner, if it is confirmed by the finding of the property, will be admitted; as, for instance, if a man by a promise of favour is induced to confess that he knowingly received certain stolen goods and that they are in such a room in his house, and the goods are found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved that in consequence of something the witness heard from the prisoner he found the goods in question in the prisoner's house." The cases cited by Phipson are relied on. The learned author goes on: "And it would seem also that a declaration of the prisoner accompanying such acts may be received in evidence even though the confession itself may be inadmissible."

*Rex v. Griffin*, *supra*; *Rex v. Jones* (1809), Russ. & Ry. 152, 168 E.R. 733, and *Reg. v. Leatham* (1861), 30 L.J.Q.B. 205, are quoted as authority for this latter statement. But these cases do not give legal foundation for the breadth of the language used by the author.

Wigmore on Evidence, 3rd ed. 1940, art. 857 (vol. 3, p. 338) states the relevant principle in terms that may be supported by the law of the United States of America but are not warranted by judicial decision in Canada or in England.

Now I consider the cases relied on by the authors and some cases in which these have been discussed:

In *Rex v. Warickshall* (1783), 1 Leach 263, 168 E.R. 234, one Littlepage was indicted for grand larceny and on the same indictment Jane Warickshall was charged with being an accessory after the fact, and with having received the property knowing it to have been stolen. The accessory made a full confession of her guilt and as a consequence of it the property was found in her lodgings, concealed between the sackings of her bed. The confession, however, was obtained by promises of favour. After referring to the law relating to the reception of confessions, the Court stated:

"This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as proof of the fact, clearly shews that the fact may be admitted on other evidence; for as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not." The judgment goes on:

"But this subject has more than once undergone the solemn consideration of the twelve judges; and a majority of them were clearly of opinion, That although confessions improperly obtained



cannot be received in evidence, yet that *any acts done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession.*" (The italics are mine.)

*Rex v. Mosey* (1784), is referred to in the notes, 1 Leach at 265, 168 E.R. at 235 as authority for this statement. The following is taken from the judgment of the court in that case: "Whatever *acts* are done, are evidence; but if those acts are not sufficient to make out the charge against the prisoner, the conversation or confession of the prisoner cannot be received, so as to couple it with those acts, in order to make out the subject-matter of proof." *Rex v. Lockhart* (1785), 1 Leach 386, 168 E.R. 295 is also referred to. The note also contains the following statement: "But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true." And reference is made to *Rex v. Butcher, supra*.

The matter is discussed in East's Pleas of the Crown, 1803, vol. 2, at p. 658. After dealing with the principle on which confessions are rejected, it is stated:

"... that reason is done away if such confession be substantiated by an actual finding of the goods accordingly in the place described, which could not probably be known to the party if he were not privy to the felony. But this opinion must it seems be taken with some grains of allowance; for in such case, the most that is proper to be left to the consideration of the jury is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner's having stolen *or put them there*, which is to be collected or not from all the circumstances of the case: and this is now the more common practice." (The italics are mine.)

Two cases difficult to reconcile are reported in Russell and Ryan's reports.

The first is *Rex v. Griffin, supra*, at p. 151. The prisoner was charged with stealing a guinea and two promissory notes. The prosecutors told him that it would be better for him to confess. It was held that the confession was inadmissible on the

ground that an inducement had been held out. Evidence was received that following the confession of the prisoner he brought to the prosecutor a guinea and a £5 Reading bank note, which he gave up with the statement that they were the guinea and one of the notes that had been stolen from him.

The matter was considered by a court of very eminent judges, including Lord Ellenborough and Chief Justice Mansfield. Seven of the judges held that the conviction was right and should be sustained. Lawrence and LeBlanc JJ. were of the contrary opinion. Mr. Justice LeBlanc's opinion was that the portion of the statement that included the words "that it was one of the notes stolen from the prosecutor" ought not to have been admitted.

Immediately following that case is reported the case of *Rex v. Jones, supra*, where the matter was considered by the same judges and a decision was arrived at that appears to be quite contrary in principle to the former decision. In the *Jones* case the prosecutor asked the prisoner, on finding him, for the money he had taken out of the prosecutor's pack. Before it was produced he said he only wanted his money and if the prisoner gave it to him he might go to the devil if he pleased; thereupon the prisoner took 11s. 6½d. out of his pocket and said it was all he had left of it. It was held that the confession ought not to have been received and that the accompanying statement was inadmissible and the conviction wrong.

The only basis on which I can reconcile this judgment with the judgment in the *Griffin* case is that the actual money turned over by the prisoner could not be identified as the money that had been stolen but was a balance of account, so to speak; that is, the balance he had left after having spent another portion. The judgments in those two cases are not elaborate but they have puzzled the judicial mind for many years.

The decision in *Reg. v. Gould, supra*, adds additional confusion to the matter. This case is known as "the lantern case" and has been referred to frequently but not rationalized by decision. The prisoner was indicted for a burglary in the dwelling-house of one John Templeman; he made a statement to a policeman under circumstances that rendered it inadmissible in evidence. Because the statement contained some allusion to a lantern, which was afterwards found in a particular place, the

policeman was asked whether in consequence of something which the prisoner had said he made a search for the lantern. Chief Justice Tindal and Baron Parke were both of the opinion that the words used by the prisoner with reference to the thing found ought to be given in evidence and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's Fields. The other parts of the statement were not given in evidence.

Many relevant cases were reviewed in a judgment in the New Brunswick courts in 1886 in *Reg. v. McCafferty* (1886), 25 N.B.R. 396. There a court of five judges was divided three to two on the subject. The majority judgment was written by Mr. Justice Palmer. A police officer had told the accused that the party from whom the goods were alleged to have been stolen was a good-hearted man, and that he thought that if he got his goods back he might not prosecute. About an hour later the prisoner told the police officer that if he went to a certain place in the woods, which he described with particularity, he would find the goods. The police officer went to the place described and found the goods there concealed. The question was whether the evidence of the finding of the goods under those circumstances was properly received. Mr. Justice Palmer at p. 398 states:

"The fact of finding the goods in the place in which they were found, and their condition, was clearly admissible, even though they were found in consequence of the information which the prisoner gave—although improper inducements had been held out; and whether or not the witness might not have gone further and stated that he had gone to the place in consequence of what the prisoner had told him, is not necessary now to decide."

Further down on the same page the learned judge says:

"The confession is not necessary to prove where the goods were, that is properly proved *aliunde*, and I cannot, on principle, see how the confession can be allowed to be used against the prisoner further, without a complete subversion of the principle. If it were allowed to prove by such confession, that he had the goods or that he took them—and this is necessary to convict—it is apparent that he would be convicted on a confession or statement of a fact that he was improperly induced to make. I think, therefore, the conviction should be quashed."



The learned judge adds:

"I give no opinion as to whether, if the goods had been found in the prisoner's house, or on his person, or he had produced or pointed them out under improper inducement, his declaration accompanying such acts would be admissible. Such a principle has some precedent in the case of *Reg. v. Leatham*, and if so, it can only be on the principle that they may be taken as part of the act itself, and admissible to qualify it, on the principle laid down by the Court in *Bateman v. Bailey*, [(1794), 5 T.R. 512, 101 E.R. 288], that it is an admission made at the time in explanation of his own act, and therefore proof like any other fact."

A very complete discussion of the cases with which I have already dealt is to be found in the dissenting judgment of Allen C.J., which is concurred in by King J.

The learned Chief Justice finds somewhat the same difficulty that I do in reconciling *Rex v. Griffin* and *Rex v. Jones*. He also discusses the *Gould* case and the *Leatham* case, and states his conclusion as follows: "In the present case, the evidence admitted seems to have been entirely within the rule laid down in *Reg. v. Gould* and in Taylor on Evidence, viz., the prisoner's statement that the goods would be found in a particular place, and the finding them there accordingly; and not to violate that part of the rule which declares that it would not be proper to prove an admission of the prisoner that he had concealed the goods there; for it does not appear in this case that there was any evidence of an admission by the prisoner that he had stolen the goods, as was the case in *Rex v. Griffin* and *Rex v. Jones*, (*supra*), or that he had put them in the place where the policeman afterwards found them; nor is the evidence open to the objection which certainly existed in *Reg. v. Berriman* [(1854) 6 Cox C.C. 388], where the question was directed to an admission of the very crime with which the prisoner was charged."

The law involved has been the subject of discussion in our own courts in two cases, the first of which is *Reg. v. Doyle* (1886), 12 O.R. 347, which was decided later in the same year as the *McCafferty* case and does not refer to it. The judgment is that of a Divisional Court. At pp. 353-4 Wilson C.J. refers to the earlier cases which I have discussed and makes this general statement of the law:

"If a prisoner make a confession of guilt of the larceny charged against him by means of threats or promises of favour or advantage made or held out to him by anyone having authority over him, and say where the property will be found, and from the information so improperly obtained the property is found at the place named, the fact that the property was so found *upon the information of the prisoner* is admissible against him although that information was wrongly obtained. The confession itself cannot however be used against him, because of the manner in which it was procured. The reason the confession in such a case is not admissible is, that in law it cannot be depended upon as true, for one in such a case may say, and is likely to say, that which is not the truth, if he thinks it will be to his advantage to do so."

In *Rex v. White* (1908), 18 O.L.R. 640, 15 C.C.C. 30, the matter was again considered with relation to a key which was an important piece of evidence in the trial of the case. The prisoner made a confession which was not admissible. In it he told the police officers where the key would be found, and it was found as indicated. Osler J.A. at p. 644 stated: "The statement made to the officer Jackson, after the interview with the Chief of Police, as to where the key of Pearce's house would be found, confirmed as it was by the finding of the key in the place described, was plainly admissible, for, even if accompanying language amounting to a confession was inadmissible as possibly untrue, this fact at least was not."

The matter has been more recently discussed in the Court of Appeal of British Columbia in *Rex v. Pais*, 56 B.C.R. 232, 75 C.C.C. 318, [1941] 3 W.W.R. 278, [1941] 2 D.L.R. 748, where McDonald J.A., in delivering the majority judgment of the Court, even doubted the admissibility of the evidence of a police officer who said that as the result of a statement made by the accused he was taken by the police to a certain house where they found the stolen property. The Court ultimately decided that it was not necessary to come to a decision on that point. McQuarrie J.A. delivered a judgment doubting the correctness of the judgment of the majority of the Court, but not dissenting.

I do not get much help from this decision on the difficult point with which I have to deal. The editorial note contained in the reports in D.L.R. and C.C.C. is useful as a discussion of the subject.

The last reference to the subject I have been able to find is in *Rex v. Simpson and Simmons*, 59 B.C.R. 132, 79 C.C.C. 344, [1943] 2 W.W.R. 426, [1943] 3 D.L.R. 355, which is also a judgment of the British Columbia Court of Appeal. In that case the Court was discussing the admissibility of evidence concerning facts learned as a result of evidence given but protected under the provisions of The Canada Evidence Act, R.S.C. 1927, c. 59. McDonald C.J.B.C., at pp. 139-40, says:

"But it is said that, apart from the statute altogether, these books and documents are protected at common law. Nothing could be further from the fact. It is trite law that where anything is found in consequence of a statement made by a prisoner under circumstances which preclude its being given generally in evidence, nevertheless such part of it as relates to the thing found in consequence is receivable, and ought to be proved." *Rex v. Griffin, supra*, and *Reg. v. Gould, supra*, are referred to and the judgment goes on: "If there is any difference in principle between an admission made under oath in answer to a question which the witness is compelled by law to answer and a confession made under circumstances which make it inadmissible in evidence, I am unable to see that difference."

After the most earnest consideration that I have been able to give the whole matter in the time at my disposal, I have come to the conclusion that my decision must rest on this fundamental principle:

Where the discovery of the fact confirms the confession—that is, where the confession must be taken to be true by reason of the discovery of the fact—then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible. Of all the authorities referred to, Taylor most nearly agrees with this view of the law.

It is therefore permissible to prove in this case the facts discovered as a result of the inadmissible confession, but not any accompanying statements which the discovery of the facts does not confirm. Anything done by the accused which indicates that he knew where the articles in question were is admissible to prove the fact that he knew the articles were there when that fact is confirmed by the finding of the articles; that is, the knowledge of the accused is a fact, the place where the articles were found is a fact. If he does or says something that indicates



his knowledge of where the articles are located, and that is confirmed by the finding of the articles, then the fact of his knowledge is established. On the other hand, it is not admissible to show that the accused said he put the articles where they were found, as the finding of them does not confirm this statement. The finding of them is equally consistent with the accused's knowledge that some other person may have put them in the place where they were found.

I realize this is placing a limitation on the evidence that was not placed on it in the *Griffin* case or the *Gould* case, but I cannot rationalize the decisions in those cases with the underlying principle, *i.e.*, that the finding of the article confirms the statement. If, for instance, the accused had said, and I am only using this as an illustration, "I threw the wallet over the fence", the finding of the wallet does not confirm that he threw it over the fence; it is equally consistent with his seeing some other person throw it over the fence. We are therefore driven back to an inadmissible confession for proof that he threw it over the fence. On the other hand, the finding of the wallet does confirm that he knew it was in the place where it was found.

I will now review the evidence tendered on the *voir dire* and apply these principles to it. It may be that in the light of my finding Crown counsel will desire to offer the evidence that is available, in conformity with my ruling. Det.-Sgt. Keay's evidence may be conveniently dealt with as follows:

"The accused was taken to the south-east portion of the race-track." I think it would be admissible for Det.-Sgt. Keay to say that as the result of information received the accused was taken by the officers to the south-east portion of the race-track.

"He indicated the place on the map." That is admissible.

The witness says the accused said at that place, referring to the twitch: "I did not throw it; I just tossed it." In my view, that is not admissible.

"It should be about ten feet in." That is admissible.

"The different articles will be separated by a little distance." Up to that point, that is admissible. The remaining part—"I was going along the fence as I tossed them over"—is not admissible.

Then Det.-Sgt. Keay was asked again to detail the events, and I again deal with his evidence as it was repeated:

"After we got to the Woodbine the accused and I were standing opposite the wire fence." That is admissible.

"I asked him how far he threw the twitch. The accused replied, 'I didn't throw it; I just tossed it.'" That is not admissible.

"He indicated with his hand that he had just flipped it over." That is not admissible.

"I asked him if he threw the twitch and the pocket-book at the same time. He said, 'No, I threw them separately.'" That is not admissible.

"I took the handcuffs off, got a ladder and started to search." That is admissible.

"He said he would take us down and show us where he had thrown the twitch." That is not admissible.

"He indicated to us where to place the ladder. Do not recall how he had indicated." That is admissible.

Sgt. Bolton's evidence that the accused stated "So I took his money and also his wallet" is not admissible.

"I threw the twitch away" is not admissible.

"I threw the wallet into the bay at the same place as I threw the twitch." That is not admissible.

"I gave the money to Pete Hylinsky and said to him, 'Lock this up, Pete.'" That statement gives me much more concern, as the fact that he gave the money to Pete Hylinsky is confirmed by Hylinsky, but I am rejecting it because of the danger that the words "the money" raise in interpreting the statement. It might be interpreted as a confession that it was the money he took off the deceased's person. That would not be admissible. We already have the proof that a sum of money was given to Hylinsky, and I do not think the confession can be drawn on to amplify that proof as indentifying it with money taken from the deceased.

"Det.-Sgt. Keay handed the accused over to Mace." That is admissible.

"Mace asked the accused where he threw the twitch and wallet and he indicated." That is not admissible in that way, but it would be admissible if it was tendered that the accused indicated to the officers where the twitch and wallet should be, but no statement that he put them there.

"On arrival at the Woodbine we turned east and came along the side of the restaurant." That is admissible.

"The accused said he threw the twitch over the fence." That portion, as I have stated, is not admissible, but the officer went on to say that he pointed out the place. The officer would be permitted to say that the accused did the physical act of pointing to a particular place and indicating what would be found there, but he must not give evidence that the accused said he put it there.

"The accused walked with Sgt. Mace. We stopped at the second place. He said he threw the wallet and liquor permit there." There again it would be permissible to give in evidence that the accused walked with Sgt. Mace and stopped at a certain point and indicated that the wallet and liquor permit would be found in that place, and they were found in that place, but not that the accused put them in that place.

"In a short time O'Driscoll placed the ladder where he said, 'You will find the twitch right here.'" That is admissible.

"He pointed to a section of the fence, he said, 'This is the place here.'" That is admissible.

And in cross-examination: "The accused pointed to the spot." That is admissible.

*Evidence admitted in part.*



[McRUER C.J.H.C.]

**Re Telfer and Telfer v. Kerr and Seager.**

*Motor Vehicles—Unsatisfied Judgment Fund—Principles to be Applied in Exercise of Court's Discretion—Nature and Purpose of Fund—Insurance—The Highway Traffic Act, R.S.O. 1937, c. 288, s. 93b, as enacted by 1947, c. 45, s. 16, and amended by 1948, c. 39, s. 5.*

While the legislation providing for the unsatisfied judgment fund is beneficial in character, and, as said in *Re Macbeth v. Curran*, [1948] O.R. 444, "the rights created are not to be frittered away by narrow judicial interpretation," it is also to be remembered that the object of the legislation is to relieve against hardship and not to provide a fund in the nature of a free reinsurance scheme for insurers of persons who suffer damage as the result of the operation of motor vehicles, or a means by which insured persons may be twice compensated for injuries sustained. The fund is a public one, set up by means of a levy on all licensed operators of automobiles, and is to be regarded as a last resort.

AN APPLICATION for payment of a judgment out of the unsatisfied judgment fund.

22nd February 1949. The application was heard by McRUER C.J.H.C. in chambers at Toronto.

*R. T. Payton*, for the plaintiffs, applicants.

*E. H. Silk, K.C.*, for the Minister of Highways, respondent.

14th March 1949. McRUER C.J.H.C.:—This is an application made under the provisions of s. 93b of The Highway Traffic Act, R.S.O. 1937, c. 288, as enacted by 1947, c. 45, s. 16, and amended by 1948, c. 39, s. 5, for the payment out of the unsatisfied judgment fund of the amount of a judgment obtained by the plaintiffs against Donald Kerr and Joyce Seager.

The formal judgment provides that the plaintiff Dora E. Telfer recover against the defendants Donald Kerr and Joyce Seager the sum of \$905.75, and that the plaintiff Herbert A. Telfer recover against the defendants Donald Kerr and Joyce Seager the sum of \$1,756.55. The degrees of negligence between the respective defendants are apportioned, but for the purposes of this application that and other provisions of the formal judgment are immaterial.

The facts giving rise to this application are quite unusual. The sum of \$905.75 was awarded as damages for injuries sustained to a motor car owned by the plaintiff Dora E. Telfer which was involved in the accident, and the sum of \$1,756.55 was the amount of the damages assessed for personal injuries sustained by the plaintiff Herbert A. Telfer.

The material shows that a policy of insurance was placed on the motor car in question in the name of Herbert A. Telfer. The policy contained a clause providing for "\$100 deductible". The loss was adjusted at \$888. A direct payment on account of the repairs was made by the adjusters amounting to \$38 and \$750 was paid by cheque made payable to Herbert A. Telfer and endorsed by him to Dora E. Telfer. The actual cost of repairs amounted to \$805.75 and at the trial \$100 was allowed for depreciation on the value of the motor car due to the accident, making the total damages awarded \$905.75.

It was contended on the argument, with respect to this item, that the insurance company was under no obligation to pay the loss as the insured under the policy was not the owner of the motor car and there being no obligation to pay this case did not come within the provisions of s. 93b(2)(f), as enacted by 1948, c. 39, s. 5(2). It is argued that no part of the amount sought from the unsatisfied judgment fund is sought in lieu of making a claim or receiving a payment which is payable by reason of the existence of a policy of automobile insurance within the meaning of The Insurance Act, R.S.O. 1937, c. 256, and that no part of the amount so sought will be paid to an insurer to reimburse or otherwise indemnify such insurer in respect of any amount paid or payable by the insurer by reason of the existence of a policy of automobile insurance within the meaning of The Insurance Act.

The respondent contends that the sum of \$1,756.55 payable to the plaintiff Herbert A. Telfer should be reduced by deducting the sum of \$734.55, being the amount received under a policy of accident insurance carried with the Employers' Liability Assurance Corporation Limited. This amount is the sum of \$359.55 paid by the insurer for medical expenses and \$375 paid as a weekly indemnity. On the assessment of damages \$356.55 was allowed for medical expenses; a small item of \$3, which was paid by the insurer, was not taken into account. No claim for loss of earnings was made at the trial as the plaintiff's salary, or honorarium as it was called, was paid during the time he was under disability. Notwithstanding that he suffered no loss of salary, the weekly indemnity provided for in the policy was paid. It is argued on behalf of Herbert A. Telfer that he

ought to be paid the full amount of his judgment out of the fund notwithstanding that he has received indemnification from the insurance company in respect of these two items.

In *Re MacBeth v. Curran*, [1948] O.R. 444, [1948] 3 D.L.R. 85, Mr. Justice Gale considered the purpose of the statute here in question and laid down some principles to be applied in the exercise of the discretion vested in the Court under s. 93b(4). With the principles there outlined I entirely agree, but there are other principles of a converse nature that I would add. While this legislation is beneficial in character and "the rights created are not to be frittered away by narrow judicial interpretation", it is at the same time to be remembered that the object of the legislation is to relieve against hardship and not to provide a fund in the nature of a free reinsurance scheme for insurers of those who have suffered damage as the result of the operation of motor vehicles, or any means by which insured persons may be twice compensated for injuries sustained. As I indicated on the argument, this is a public fund set up by means of a levy on all licensed operators of automobiles, and is to be regarded as a sort of last resort. As long as judges bear in mind, in the exercise of their discretion under the statute, the principles outlined by my brother Gale on the one hand, and these principles on the other, there will be no difficulty in administering the fund, but once they are departed from, its administration will become very difficult and may lead not only to discrepancies but to the use of the fund for purposes for which it was never intended.

I now apply these principles to this case.

Mrs. Telfer has already been paid the full amount of the loss on the automobile less the sum of \$117.75. It is true that in the peculiar circumstances through which the husband was recognized by the insurer as the owner, although he was not the owner, there may not be a right of subrogation, but I feel that it would be an unconscionable exercise of my discretion to permit the plaintiff to recover from the unsatisfied judgment fund after having already received indemnification from the insurer through the insurance carried by her husband on the automobile, and in this way to make a profit from the accident



amounting to \$788. I therefore allow payment out of the fund of the sum of \$117.75 only with respect to the claim of Dora E. Telfer.

The policy of insurance under which the sum of \$734.55, being the aggregate of the sums of \$359.55 paid for medical expenses and \$375 weekly indemnity for loss of earnings, was paid, provides as follows:

"THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED . . . In Consideration of the statements and agreements in the application for this Policy, a copy of which is endorsed hereon and made a material part hereof, Does Hereby Insure HERBERT ARTHUR TELFER . . . against loss resulting directly and independently of all other causes from bodily injuries sustained by the Insured during the term of this Policy and effected solely through accidental means, subject to the provisions, conditions and limitations herein contained."

The principal sum is set out at \$3,000 and the weekly indemnity is fixed at \$70 per week. In the application the following question appears:

"Do your average weekly earnings exceed the aggregate single weekly indemnity payable under this policy and all other similar policies carried by you?" Answer, "Yes."

With respect to the amount of \$359.55 the insurer unquestionably, at common law, would be subrogated to the rights of the insured upon payment of this amount to him, and any sum he received in compensation from the unsatisfied judgment fund would be held in trust for the insurer. It is argued that as automobile insurance only is mentioned in s. 93b(2)(f) the section must be construed as excluding from consideration the circumstance that payment out of the fund would in effect reimburse the insurer for payment made on account of accident and health insurance. I cannot agree with this argument. As I have pointed out, I do not think the scheme of the fund is such that I am called upon to exercise my discretion in such a way as to indemnify any insurer against payments made on a claim under a policy of insurance.

The item of \$375 is on a slightly different footing. It is argued that in view of the fact that this sum was paid by the insurer during the time the male plaintiff was incapacitated, notwithstanding that the insured suffered no loss of earnings by

reason of the accident, and that no allowance for loss of earnings was included in the amount awarded for personal injuries, this item ought not to be deducted from the sum to be paid out of the unsatisfied judgment fund. The payment was made under a contract which on its face purported to be one of indemnification. If it was not, it was a mere betting contract; that is, a contract that the insurer would pay the insured \$70 per week for the period of disability if he suffered an accident. If the contract was one of indemnification, the insurer would be entitled to subrogation and the principle applied to the former item would apply to this. The plaintiff has in any case received payment on account of his injuries to the extent of \$375 from another source, and with respect to this amount no order should be made.

An order will therefore go for payment out of the unsatisfied judgment fund to the female plaintiff of the sum of \$117.75 and to the male plaintiff of \$1,022, being the amount awarded less the sum of \$734.55 received from the Employers' Liability Assurance Corporation Limited.

Notwithstanding that the applicants have been unsuccessful in all contentious matters I think I should allow costs, fixed at \$65. The points raised were new, and an application was necessary in any case. An order will go accordingly.

*Order accordingly.*

*Solicitors for the plaintiffs, applicants: Cassels, Brock & Kelley, Toronto.*

*Solicitor for the Minister of Highways, respondent: J. D. Hilton, Toronto.*

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[COURT OF APPEAL.]

**Stinson v. The Township of Middleton.**

**Wright v. The Township of Middleton.**

*Taxation—Municipal Real Property Assessment—Crown Lands—Assessment of Tenant—Crown Employee Required to Live on Crown Property—Whether a “tenant”—The Assessment Act, R.S.O. 1937, c. 272, ss. 1(i), (o), 4(1), 38(1), as amended—The British North America Act, s. 125.*

Where employees of the Dominion Government are required, for the performance of their duties, to live on Crown lands, deductions being made from their salaries for the use of their respective houses, but the amount of the deduction being based upon the amount of salary rather than upon a rentable value of the house in each case, they are not “tenants” of their houses, within the meaning of s. 1(o) of The Assessment Act, and are accordingly not assessable under s. 38(1), as amended.

The question whether such persons are tenants, and assessable as such, is a question of law, and an appeal consequently lies upon that question under s. 85 of the Act.

Per LAIDLAW and ROACH JJ.A.: The tax authorized by s. 38(1) of The Assessment Act is a tax on land, and the section must accordingly be construed as authorizing an assessment of Crown lands only where the “tenant” of such lands has an interest therein.

APPEALS by way of special cases stated by Brickenden Co. Ct. J., of the County Court of the County of Norfolk.

17th January 1949. The appeals were heard together by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

*J. R. Cartwright, K.C.*, for the appellants and the Attorney-General of Canada: The appellants are not assessable, and any assessment, in the circumstances, is in direct violation of s. 125 of The British North America Act. I submit, accordingly, (1) that we are not within the ambit of s. 38(1) of The Assessment Act, R.S.O. 1937, c. 272, as re-enacted by 1946, c. 3, s. 6, and amended by 1947, c. 3, s. 16; or (2) alternatively that if we are within the subsection it is *ultra vires* as being in conflict with s. 125.

I submit also that I am entitled to refer to the trial judge’s reasons for judgment, although they are not embodied in the stated cases. [ROBERTSON C.J.O.: To change or qualify a statement of fact?] At least to explain an ambiguous statement.

The tax in question is imposed under s. 4 of The Assessment Act, as amended by 1947, c. 3, s. 4, which expressly exempts from taxation land belonging to Canada or to any Province.



"Land" is defined in s. 1(i), as amended by 1947, c. 3, s. 1(2), and nowhere in the Act is there any provision defining "land" with respect to various interests therein. The definition of "tenant" is found in s. 1(o).

While the cases do establish the right of a municipality to tax the interest of an individual in Crown lands, and to provide that the assessment can be for the whole value of the land, there is no case justifying such an assessment unless the taxing authority can establish that the person assessed has an interest in the land, and is more than a bare licensee in possession. I refer to *The King v. The City of Ottawa*, [1947] Ex. C.R. 118 at 125, [1947] 2 D.L.R. 265, and cases there cited: *City of Vancouver v. The Attorney-General of Canada et al.*, [1944] S.C.R. 23, [1944] 1 D.L.R. 497 at 525. It is not suggested that either appellant here has any interest in the lands, unless there is some form of tenancy.

If the Legislature meant, by the combined effect of ss. 1(o) and 38(1), to empower a municipality to tax some person in respect of Crown land who had no interest in it, the legislation is *ultra vires*. The tax is clearly on land, and does not purport to be anything else. [ROBERTSON C.J.O.: Is that necessarily so if the tax is made collectible from individuals, and not out of the land?] A tax is always on land, and that character never changes, even under s. 38(1). I refer to s. 164(1), which also indicates that the interest of the person assessed must be capable of being sold. Section 8 shows that a different wording is employed where a personal tax is imposed.

An interpretation section in a statute is not always applicable, and the word "tenant" appears in The Assessment Act scores of times, and in many connections, and the definition in s. 1(o) cannot apply in all cases: 31 Halsbury, 2nd ed. 1938, p. 476, s. 591. The word "tenant" in s. 38(1) should be given its usual meaning, rather than the special meaning given to it in s. 1(o). The facts in the stated cases do not indicate any relationship of landlord and tenant between the Crown and the appellants. The Crown can grant a lease, or give to an individual an interest in Crown lands, only by order in council: The Expropriation Act, R.S.C. 1927, c. 64, s. 35; The Public Lands Grants Act, R.S.C. 1927, c. 114, s. 4; The Public Works Act, R.S.C. 1927, c. 166, s. 39; *Livingston v. The King* (1919), 19 Ex. C.R. 321; *The King*

*v. Vancouver Lumber Co.*, 50 D.L.R. 6, [1920] 1 W.W.R. 255; *The King v. British American Fish Corporation* (1919), 59 S.C.R. 651, 52 D.L.R. 689; *H. Young & Co. v. Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517.

If there is no tenancy, an "interest" in the land must at least be more than a bare right of occupancy. There is here clearly nothing in the nature of a *profit à prendre*, because the appellants have no right to take anything from the land: *Frank Warr & Co., Limited v. London County Council*, [1904] 1 K.B. 713 at 717, 721; *Canadian Pacific R.W. Co. v. Alexander Brown Milling and Elevator Co.* (1909), 18 O.L.R. 85, affirmed (1910), 42 S.C.R. 600.

*Re Town of Cochrane and King*, 56 O.L.R. 477, [1925] 2 D.L.R. 550, appears to be directly against my submission, but there everyone seemed to assume that the person in occupation was a tenant, and attention was concentrated on the question whether he occupied the lands in an official capacity (words which are no longer in the statute). The passage at p. 480, in its reasoning, is in my favour, and the case is easily distinguishable on its facts from this one.

Even the word "occupant", properly construed, does not cover these appellants, who have no control over the premises. A servant who lives in premises of his master in connection with his duties, and for his master's purposes, is not an occupant. In such cases the master occupies through the servant: *White v. Bailey et al.* (1861), 30 L.J.C.P. 253.

I refer also to Williams, *Canadian Law of Landlord and Tenant*, 2nd ed. 1934, p. 5; Woodfall, *Landlord and Tenant*, 24th ed. 1939, p. 12. These appellants do not pay rent or any other valuable consideration for the occupation of their houses. The terms of their employment simply are, in effect, that they receive a stated sum of money, together with the living quarters, which they are required to occupy.

*C. R. Magone, K.C., Deputy Attorney-General*, for the Attorney-General for Ontario: No constitutional question arises here, because the tax is imposed on a person but based on the value of the land. Before the 1946 amendment s. 38(1) contained the words "except a tenant occupying the same in an official capacity under the Crown". The amendment is obviously designed to widen taxing powers.

I concede that if the occupation of these lands is that of the Crown, and not of the appellants, s. 38(1) does not authorize any tax in respect of the lands.

The opening words of s. 38(1), added by the 1947 amendment, do not make this a tax on land. They were merely added *ex abundanti cautela*. The legislation here authorizes a tax on a person, using as a yardstick the value of the land, which could not itself be taxed. This is quite permissible: *Kerr v. Superintendent of Income Tax et al.*, [1942] S.C.R. 435 at 439, [1942] 4 D.L.R. 289.

The following cases deal with occupancy for purposes of taxation under the poor laws: *Martin v. West Derby Union Assessment Committee et al.* (1883), 11 Q.B.D. 145; *Showers et al. v. Chelmsford Union Assessment Committee*, [1891] 1 Q.B. 339; *Cross et al. v. West Derby Union Assessment Committee* (1899), 64 J.P. 182; *Gambier v. The Overseers of the Poor of Lydford* (1854), 3 E. & B. 346, 118 E.R. 1171.

Section 164 of The Assessment Act does not refer to property owned by the Crown, but only to property in which the Crown has an interest. The only section referring to property owned by the Crown is s. 38, and it contains a corresponding provision in subs. 3.

*W. P. Mackay, K.C.*, for the respondent: There is no justification for the argument that the person assessed must have an interest of some value of the land. This question has already been decided against that contention in *Re Town of Cochrane and King*, 56 O.L.R. 477, [1925] 2 D.L.R. 550. [ROBERTSON C.J.O.: But the facts set out in that judgment are very different from the facts in these cases.] The old cases must all be read in the light of the express exemption of persons occupying in an official capacity under the Crown, which has now been abolished. An example of this is *Re Oakes and Township of Stamford*, 58 O.L.R. 624, [1926] 3 D.L.R. 102. [ROBERTSON C.J.O.: Do you argue that the dropping of those words had the effect of making all such persons liable to taxation?] Not necessarily. The amendment has the effect of removing all exemptions from Crown tenants, except possibly such persons as soldiers, etc., who cannot leave the place where they are living.

A monthly deduction is made from the salary of each appellant for the use of his house. This may not be rent *stricto sensu*,



but it is undoubtedly within the words "any valuable consideration" in s. 38(1). It makes no difference that it is in the form of a deduction rather than a direct payment by the appellants: *Re Oakes and Township of Stamford, supra*.

There is nothing in the stated cases to show that there was no order in council granting to these appellants an interest in the lands.

There is a long line of cases dealing with "occupying" for the purpose of sections dealing with universities, etc. In such cases an inquiry into the servant's occupation is relevant because it is the measure of the exemption. Here the exemption is absolute.

This is not a tax on land. The word "land" in s. 125 of The British North America Act, and in The Assessment Act, has been construed as meaning an interest in land: *Smith v. The Rural Municipality of Vermilion Hills* (1914), 49 S.C.R. 563 at 570, 572, 20 D.L.R. 114, 6 W.W.R. 841, affirmed [1916] 2 A.C. 569, 30 D.L.R. 83, [1917] 1 W.W.R. 108. The fact that collection may be difficult is no ground for refusing the right to tax: *City of Montreal v. Attorney-General for Canada*, [1923] A.C. 136 at 143-4, 70 D.L.R. 248; *Nickell v. City of Windsor*, 59 O.L.R. 618, [1927] 1 D.L.R. 379. [ROACH J.A.: Section 38(1) says that a tenant of Crown land may be assessed in the same way as if the land were not owned by the Crown. What provision is there in the Act for assessing a *person*, except in the case of business tax?] He is assessed for the full value of the land: *City of Montreal v. Attorney-General for Canada, supra*; approving *Re Town of Cochrane and Cowan* (1921), 50 O.L.R. 169, 64 D.L.R. 209.

As to the different kinds of tax possible under this section, I refer to *The Attorney-General of Canada et al. v. City of Vancouver*, 58 B.C.R. 371, [1943] 1 W.W.R. 196, [1943] 1 D.L.R. 510 at 514. Although this case was reversed on appeal, *sub nom. City of Vancouver v. The Attorney-General of Canada et al.*, [1944] S.C.R. 23, [1944] 1 D.L.R. 497, the reversal was on other grounds, and not in this respect.

As to the incidence of the tax, I refer to the judgment of Rand J. in the *Vancouver* case, *supra*, and to *Fairbanks Estate et al. v. The City of Halifax*, [1926] S.C.R. 349, [1926] 1 D.L.R. 1106, per Duff J., whose dissenting judgment was approved in

the Privy Council: [1928] A.C. 117, [1927] 4 D.L.R. 945, [1927] 3 W.W.R. 493; also to the *Montreal* case, *supra*, at p. 142.

*J. R. Cartwright, K.C.*, in reply: The very foundation of the judgment in the *Vermilion Hills* case, *supra*, was that the person sought to be taxed had a substantial interest (a written lease) in the land.

Two types of taxation are contemplated by The Assessment Act: a tax on land and a business tax, on persons. The Act provides not only for assessment but also for taxation. The only personal liability for land tax is under s. 99, and that section refers expressly to a tax on land. If the only land to which the tax collector can point is exempt from taxation, his claim must fail, unless he can show some interest in the land in a person other than the Crown. This is very well put in *The King v. The City of Ottawa*, *supra*.

*Cur. adv. vult.*

16th March 1949. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment in this appeal prepared by my brothers Laidlaw and Roach. I am of the opinion that the question whether the appellants are tenants of the premises of the Crown where they respectively live, is a question of the construction of the relevant provisions of The Assessment Act, R.S.O. 1937, c. 272, and that under s. 85 an appeal lies, upon a stated case, to the Court of Appeal from the judgment of the County Judge.

I am further of the opinion that upon the proper construction of the relevant provisions of The Assessment Act, neither of the appellants is a tenant of any land owned by the Crown, giving to the word "tenant" the wider meaning attached to it by s. 1(o) of The Assessment Act. This latter question is fully dealt with in the reasons for judgment of my brother Laidlaw, and it would be superfluous for me to add anything to what he has said on that matter.

I would answer the first question submitted by the learned County Judge in the negative. In view of this answer to question 1, I do not think it is necessary to answer either question 2 or question 3. I would answer both questions 4 and 5 in the affirmative.

In my opinion it is not necessary, nor do I think it desirable, to express any further opinion upon the scope of s. 38 of The Assessment Act as amended in 1946 and in 1947.

I agree that the appeal should be allowed, with costs.

LAIDLAW J.A.:—Upon the request made on behalf of each of the appellants His Honour Judge G. A. P. Brickenden, of the County Court of the County of Norfolk, noted certain questions of law or construction and pursuant to s. 85(2) of The Assessment Act, R.S.O. 1937, c. 272, he stated the same under date the 18th October 1948, in the form of two separate special cases for the Court of Appeal. There are certain differences in the facts as set forth in the two cases, which I shall later indicate, but the appeals were argued together and counsel appearing in this Court did not suggest that the cases should be treated separately or that the Court might reach a different decision in one case from that in the other.

I shall quote the special case stated by the learned County Judge at the request of the appellant Stinson and show in italics the additions and differences therefrom in the case stated at the request of the appellant Wright:

“The appellant is ‘Senior Officer-in-Charge’ of [*a teamster at*] the Experimental Farm, in the Township of Middleton, in the County of Norfolk, being part of Lot Number Forty (40) in the First Concession North of the Talbot Road, owned by His Majesty the King in right of the Dominion of Canada, and has been in exclusive possession of a dwelling house built by the Department upon the said lands. This property is known as the Dominion Experimental Farm Sub-Station, Delhi, and operated by the Federal Department of Agriculture for experimental purposes. There was no written contract between Stinson [*Wright*] and the Department but the understanding is that Stinson [*Wright*] is to reside upon the property during the term of his employment [*and is required to furnish accommodation to two students during the summer with no additional compensation except as to meals served by him*] and has no right to occupy the premises after his term of employment ceases.

“Stinson [*Wright*] is paid a salary by the Department and a deduction of \$30.00 [*\$15.00*] from his salary is made by the



Department monthly as a deduction for his use of the house occupied by him. I further find after consideration of this case and a similar appeal by one Wright [*Stinson*] heard by me at the same time, that the amount of this deduction bears no relation to what might be called a rentable value of the dwelling house but is based upon the quantum of his salary. I further find that during the period of the appellant's employment he was a few years ago absent for some eighteen months in the Southern States and during that time the Senior Officer-in-Charge was one Vickery. While he was in the south he was taking a course at the behest of the Department. During that period Vickery did not reside on the Experimental Farm but lived in the village of Delhi which is about a mile distant. During the period of *Stinson's* absence his wife remained in the dwelling house and she kept Vickery posted on the details that came up during that period. [*There is no statement in the special case stated at the request of the appellant Wright as to any absence by him during the period of his employment.*]

"The Assessor of the Township of Middleton has placed the Appellant on the Assessment Roll for 1948 as tenant of a quarter of an acre of land with the residence thereon erected (the assessment of the land being \$75.00 and for the building \$1825.00 making a total of \$1900.00) claiming that the appellant is assessable by virtue of the Assessment Act. The appellant appealed this assessment to the Court of Revision which disallowed his appeal and confirmed the assessment.

#### DECISION:

"The appellant appealed to me as Judge of the County Court of the County of Norfolk, and this appeal came up for hearing on the 15th day of October, 1948, and was dismissed by me; I find upon the facts above stated that the appellant was properly assessed as being a tenant within the purview of Section 38 of the Assessment Act as amended by 10 George VI, chapter 3, section 6.

#### QUESTIONS:

"At the hearing I was requested by counsel for the appellant to note the following questions of law or construction and to state the same in the form of a special case for the Court of Appeal.

“(1) Is the appellant a tenant of the land in question?

“(2) Did the tenant pay rent or other valuable consideration in respect of such lands?

“(3) Did the appellant occupy the lands in an official capacity only?

“(4) Was the occupation of the appellant the occupation of His Majesty in right of Canada?

“(5) Were the lands in question exempted from taxation by virtue of Section 125 of the British North America Act?

“And I submit the said questions accordingly for the Court of Appeal.”

Reasons for judgment were given by the learned County Judge and a copy was attached to each special case. Certain facts and findings appear therein, but it is proper, I think, to confine my consideration to the contents of the special case.

I shall first refer to and set forth the relevant provisions of The Assessment Act.

“1. In this Act,—

“(i) ‘Land,’ ‘real property’ and ‘real estate’ shall include:

“(i) Land covered with water;

“(ii) All trees and underwood growing upon land;

“(iii) All mines, minerals, gas, oil, salt quarries and fossils in and under land;

“(iv) All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land;

“(v) [as amended by 1947, c. 3, s. 1(2)] All structures and fixtures erected or placed upon, in, over, under, or affixed to any highway, lane, or other public communication or water; but not the rolling stock of any transportation system. . . .

“(o) ‘Tenant’ shall include occupant and the person in possession other than the owner; . . .

“4. [as amended by 1947, c. 3, s. 4] All real property in Ontario shall be liable to taxation, subject to the following exemptions:

“1. [as re-enacted by 1946, c. 3, s. 1(1)] Lands or property belonging to Canada or any Province. . . .

“38. (1) [as re-enacted by 1946, c. 3, s. 6, and amended by 1947, c. 3, s. 16] Notwithstanding paragraph 1 of section 4, the tenant of land owned by the Crown where rent or any valuable

consideration is paid in respect of such land and the owner of land in which the Crown has an interest and the tenant of such land where rent or any valuable consideration is paid in respect of such land shall be assessed in respect of the land in the same way as if the land was owned or the interest of the Crown was held by any other person."

The respondent municipality maintains that each of the appellants is a "tenant" of land within the meaning and application of s. 1(o) and s. 38(1) of The Assessment Act. Counsel on behalf of the appellants maintains that upon a proper construction of s. 1(o) neither of the appellants is a tenant and, therefore, neither is within the scope and application of s. 38(1) of the statute. He argues that if the appellants are tenants within the statutory definition contained in s. 1(o) of the Act, s. 38(1) is *ultra vires* of the Legislature of the Province, because upon a proper construction of this section it makes lands or property belonging to Canada liable to taxation contrary to s. 125 of The British North America Act, which reads as follows: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

If the appellants are not tenants within the definition in s. 1(o) of The Assessment Act, it is obvious that s. 38(1) is not applicable to them, and it will be unnecessary to consider in the present case whether the latter section is in conflict with s. 125 of The British North America Act and beyond the legislative powers of the Province.

The common acceptance of the word "tenant" is: "One who holds or possesses real estate, or sometimes personalty (as an annuity), by any kind of right . . . ; also, . . . one who has the occupation or temporary possession of lands or tenements the title of which is in another." See Webster's New International Dictionary. But the fact that one person is in physical possession of lands of another does not establish conclusively that he is in possession as a tenant. Ordinarily, in order that there may be a tenant there must also be a landlord and the landlord must part with, and the tenant must acquire from the landlord, some estate or interest in the lands, be it little or great. In the case presently under consideration the respondent does not suggest that either of the appellants is a tenant within the legal meaning of that word, apart from the



definition given to it by s. 1(o) of The Assessment Act. The respondent municipality contends, however, that upon the proper interpretation of that subsection of the statute both of the appellants fall within the clause "occupant and the person in possession other than the owner". The word "occupant" in a wide sense means "one who occupies, resides in or is at the time in a place". But that word and the words "occupy", "occupier" and "occupation" appear in various statutes, and the question whether or not occupation in various circumstances amounts in law to occupation as a tenant has been the subject of many judicial opinions.

Thus in *Rex v. The Inhabitants of Cheshunt* (1818), 1 B. & Ald. 473, 106 E.R. 174, it was held that a pauper employed as a labourer by the Board of Ordnance, who resided in part of the premises owned by the Board at a weekly rent of 2s., which was deducted out of his wages, and who was required upon his dismissal from employment to give up possession of the house, occupied the house not as a tenant, but as a servant.

Lord Ellenborough C.J., at p. 476, said: " . . . the party occupied this house as a servant only, and not in the character of a tenant. It is like the case of a coachman, who frequently occupies a room over the stables; but such occupation is not within the meaning of 13 and 14 Car. 2. The pauper here was divested of the tenement as soon as his service terminated."

Bayley J. said: " . . . the tenement is connected with the pauper's service under the Board of Ordnance."

Abbott J. said: "If the case had stated, instead of using the words weekly rent, that the pauper lived in the house, and received 18s. and not 20s. per week wages, there would have been no doubt. And I consider that in substance it is so stated."

In *Reg. v. Shepherd* (1841), 1 Q.B. 170, 113 E.R. 1095, it appeared that the governor of a house of correction was assessed for a house and garden within the prison. The house consisted of ten apartments, nine in the governor's occupation, and the tenth used as a committee-room for the magistrates. The governor was obliged by the prison rules to live always within the walls, and nothing more was provided for him than was necessary for his convenient accommodation. It was held that he was not rateable for his occupation of the house or garden.

Lord Denman C.J., at p. 176, pointed out that the gaoler was "compelled to reside on the premises in question at all times; he performs his duty by that act of residence".

In *Hughes v. Overseers of Chatham* (1843), 5 Man. & G. 54, 134 E.R. 479, the facts were that A, the master rope-maker in a royal dockyard, had, as such, a house in the dockyard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. The house belonged to the Lords of the Admiralty. It was held that A occupied the house as tenant, within 2 Wm. 4, c. 45, s. 27. The *ratio decidendi* appears in the judgment of Tindal C.J., at p. 78, where he says (the italics are mine):

" . . . a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but *required* to occupy in the performance of his contract to serve his master . . . as there is nothing in the facts stated, to shew that the claimant was *required* to occupy the house for the performance of his services, or did occupy it *in order to* their performance, or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his services; and, as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong." (The revising barrister decided that the assessed person occupied the house as a tenant.)

In a later case, *Dobson v. Jones* (1844), 5 Man. & G. 112, 134 E.R. 502, the headnote is as follows:

"A., the surgeon of Greenwich Hospital, occupied, as such, a house at the infirmary in the hospital, which was appropriated to the surgeon. Repairs were done by the commissioners of the hospital. The surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum as lodging money. By the regulations of the commissioners of the hospital, no officer of the hospital is allowed to make any exchange of apartments.—Held, that A. did not occupy the house

‘as tenant,’ inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as surgeon.”

In *Clark v. The Overseers of St. Mary, Bury St. Edmunds* (1856), 1 C.B.N.S. 23, 140 E.R. 9, A claimed to be registered as the occupier of a house of the requisite yearly value to confer a vote. A was the keeper of the guildhall at B; the house in question was the residence assigned by the corporation to the hall-keeper, and he was required to reside therein; it was necessary for the due performance of his duties as hall-keeper that he should reside there. It was held that this was an occupation as servant to the corporation, and not an occupation as tenant within 2 Wm. 4, c. 45, s. 27.

I refer to only three decisions in this Province. In *Rex v. Condola* (1918), 43 O.L.R. 591, 30 C.C.C. 298, it was held that the “occupant” is the one who has actual use or possession of a thing. The occupant in that case was the owner of the premises. Falconbridge C.J.K.B., at p. 593, referring to *Kavanagh v. Barber* (1891), 12 N.Y.S. 603, pointed out:

“ . . . that a husband, though the head of the family, is not in any legal sense the possessor or occupant of the house or land owned by his wife and in or upon which the family reside. . . .

“A *fortiori* neither is a wife the occupant of the husband’s property.”

In *Rex v. Lou Hay Hung*, [1946] O.R. 187, [1946] 2 D.L.R. 111, 85 C.C.C. 308, 1 C.R. 274, Robertson C.J.O., at pp. 312 *et seq.*, discussed the meaning of the word “occupier” as used in s. 17 of The Opium and Narcotic Drug Act, 1929 (Dom.), c. 49, as re-enacted by 1938, c. 9, s. 5, and also the meaning of the word “occupants”. He referred to *Rex v. Gun Ying*, 65 O.L.R. 369, [1930] 3 D.L.R. 925 at 927-8, 53 C.C.C. 378 at 381; *Morelli v. The King*, 52 Que. K.B. 440, [1932] 3 D.L.R. 611, 58 C.C.C. 120; also to *Paterson v. Gas Light and Coke Company*, [1896] 2 Ch. 476 at 482; and *Reg. v. St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581. He expressed the opinion that the proper sense to be attributed to the word “occupies” in s. 17 is the limited sense that will extend the section only to cases where there is the element of control of the premises and of their use in the person charged.



In *Re W. C. Edwards & Co. Ltd. and City of Ottawa* (1924), 26 O.W.N. 320, the appellant company was held liable for assessment under s. 10 of The Assessment Act as a tenant of certain property. The appellant company stored lumber on the property, and the basis of the decision as stated by Masten J.A. at p. 322, is that: "The lumber is in fact in the custody and sole control of the appellant company".

The question whether a person is an occupant of premises as a tenant or merely as a servant has arisen in other cases. In *Rex v. The Inhabitants of Tynemouth* (1810), 12 East 46, 104 E.R. 19, F was entitled to Tynemouth lighthouse and to certain tolls payable in respect thereof. W was his servant, and resided in the lighthouse at an annual salary to take care of the light. It was held that the occupation of W was the occupation of his master.

In *Bertie v. Beaumont* (1812), 16 East 33, 104 E.R. 1001, the headnote showed that: "A servant put into the occupation of a cottage, with less wages on that account, does not occupy it as a tenant. . . ." Lord Ellenborough C.J. at p. 36, said: ". . . if his occupation were merely that of a servant, it was in law the occupation of the master." Grose J. said: "This was the occupation of the plaintiff through the medium of his servant, which is in law the virtual occupation of the master and not of the servant."

*The Churchwardens and Overseers of St. Anne, Westminster v. The Linnean Society of London* (1854), 3 E. & B. 793, 118 E.R. 1338, shows that the Linnean Society were the lessees of a certain house and employed a librarian and porter, whose attendance in the house was necessary for the purposes of the institution. He occupied rooms there, and in consideration thereof he received less salary. It was held that the Society were occupiers of these rooms for the purposes of the institution. Lord Campbell C.J., at p. 805, said: ". . . as to the occupation by the porter. I assume that this is subsidiary and necessary to the purposes of the Society; if so, it is an occupation by the Society through their porter and for their own purposes".

The same question has arisen in actions of trespass. In *Mayhew v. Suttle and Mills* (1854), 4 E. & B. 347, 119 E.R. 133, an agreement between S and M recited that S was in possession of a messuage. It was agreed that M should enter upon the

premises and conduct a trade thereon in the place and manner of U, who had formerly carried on for and on account of S, and until the agreement should be determined, and that thereupon S should quit and deliver up the trade and possession of the premises. M entered into possession, and it was held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that M occupied, not as tenant, but as servant to S, and could not maintain trespass against S. Wightman J. at p. 356 concluded: ". . . that the agreement in question did not create any tenancy, but that the occupation of the plaintiff was ancillary to the carrying on the trade for and on account of the defendant; and that the plaintiff therefore had no such possession as to enable him to maintain this action."

A similar case is *White v. Bailey et al.* (1861), 30 L.J.C.P. 253. The plaintiff in that case was a bookseller, employed by a society established for the sale and publication of certain works, as their storekeeper and agent, upon the terms that he should have premises rent and tax free in a good situation, and 35 per cent. on all books sold out of the shop, but not on certain other sources of income. The society occupied a house, the lease of which was vested in trustees for them, and they paid the rent and all outgoings. The ground floor was used as a shop; the first floor as a library for the members; and the plaintiff was permitted to occupy the upper rooms. The plaintiff was dismissed from his post, and notice was given him to quit the premises. Possession was taken by the defendants, and the plaintiff was turned out. He brought an action of trespass against the defendants and was nonsuited at trial. It was held that the nonsuit was right, and that the plaintiff's occupation of the premises was that of a servant. Erle C.J. said, at p. 257:

"The distinction is extremely important between granting an estate to a person, and the case where the owner of the premises places him in the premises for the purpose of enabling him to perform the duty which he is employed to do. In the latter case he has no estate."

The decisions in the cases to which I have referred depend to some extent upon a consideration of the various objects and purposes of the statutes in which the language to be construed appears, or upon the provisions of an agreement under which

one party has physical possession or use of premises. They do not conclusively determine the question now before the Court, but they provide some rules by which we may be guided to a certain extent, and which I briefly state in my own words as follows:

(1) There is a substantial difference between the class of case where a person is *permitted* to occupy premises, and the class where a person is *required* to occupy them for the performance of his services or occupies them in order to their performance or because the occupation is conducive to that purpose. In cases of the latter class, apart from special circumstances, the occupation of the premises is considered in law to be the occupation of the master and not that of the servant.

(2) The fact of payment of a sum in the nature of rent by a person entitled to the physical possession or use of premises, and whether the payment be by deduction from wages or otherwise, does not conclusively determine that such person is in possession of the premises as a tenant.

(3) To be an "occupant" of premises, as that word is understood in law, a person must have control of them.

(4) A privilege or mere licence to use premises does not necessarily include the right to exclusive possession of them, and such a privilege or licence does not ordinarily confer on the grantee any estate or interest in them.

I turn now to the particular facts as they appear in the stated cases submitted to this Court. The understanding between the representatives of the Crown, as owner of the lands, and the appellant in each case was that the appellant "is to reside upon the property during the term of his employment". He "has no right to occupy the premises after his term of employment ceases". The right of the appellants to reside upon the property is not permissive. They are required by the terms of their employment to reside there. A certain deduction is made from each appellant's salary "for his use of the house\*occupied by him", and it is not without importance to observe that "the amount of this deduction bears no relation to what might be called a rentable value of the dwelling house". In substance, the case is no different than if the appellants had agreed to accept less salary and been given the free use of the premises. The appellants did not acquire the sole control or exclusive



possession or use of the premises as against the owner. In particular, in the case stated in respect of the appellant Wright it appears that he "is required to furnish accommodation to two students during the summer". It is inconceivable that if a properly authorized officer of the Crown entered upon the premises used by the appellants, an action for trespass would lie against him. Again, if the Crown, as owner of the premises, desired possession of them from the appellants, the procedure would not be by way of notice to quit. It would be by termination of the agreement between the parties, and each of the appellants expressly agreed that he "has no right to occupy the premises after his term of employment ceases". Finally, the right given by the owner of the premises to the appellants was to the use of them. The owner did not part with any interest or estate in the lands, and the appellants did not acquire any interest or estate in them. See *Frank Warr & Co., Limited v. London County Council*, [1904] 1 K.B. 713.

I am of the opinion that neither of the appellants occupied the lands as a tenant but each occupied as a servant of the Crown, and that the occupation and possession of the lands remained in the Crown as owner. Neither of the appellants is a tenant within the meaning of s. 1(o) of The Assessment Act, and I specifically answer the questions submitted in the stated cases as follows:

(1) "Is the appellant a tenant of the land in question?" No.

(2) "Did the tenant pay rent or other valuable consideration in respect of such lands?" The deduction from wages as made by the Crown cannot be considered as rent or other valuable consideration paid by a tenant in respect of the lands.

(3) "Did the appellant occupy the lands in an official capacity only? He occupied the lands as a servant of the owner.

(4) "Was the occupation of the appellant the occupation of His Majesty in right of Canada?" Yes.

(5) "Were the lands in question exempted from taxation by virtue of Section 125 of the British North America Act?" As I have previously mentioned, it is unnecessary to consider at length and determine the question whether the assessment made against the appellant is an assessment against him personally or against the lands, but because of the argument on the hearing

of the appeal and question 5 submitted to the Court, I express the opinion that upon a proper construction of s. 38(1) of The Assessment Act, having regard to other provisions therein, the tax is a tax on land and the land is exempted from taxation by virtue of s. 125 of The British North America Act. This appears to me to be made particularly plain by the language of s. 38(3) as re-enacted by 1946, c. 3, s. 6, which expressly refers to the liability "to pay the taxes assessed against [such] land".

My conclusion is that neither of the appellants is liable to assessment or taxation under the provisions of The Assessment Act. This appeal should, therefore, be allowed with costs.

ROACH J.A.:—Although these two appeals have not been consolidated, the *ratio* of the decision in each of them must be the same and they may be conveniently and properly considered together.

The case stated by the learned County Court Judge in each of them has been set out in the reasons of my brother Laidlaw and need not be repeated by me.

Each of these appeals involves the interpretation and effect of s. 38(1) of The Assessment Act, R.S.O. 1937, c. 272, as re-enacted by 1946, c. 3, s. 6, and amended by 1947, c. 3, s. 16. As amended, and omitting the part not here relevant, the section now reads as follows:

"Notwithstanding paragraph 1 of section 4, the tenant of land owned by the Crown where rent or any valuable consideration is paid in respect of such land . . . shall be assessed in respect of the land in the same way as if the land was owned . . . by any other person."

Assessment, of course, is the first step in the levying of municipal taxes.

Section 125 of The British North America Act provides that: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

Section 4(1) of The Assessment Act, as amended by 1947, c. 3, s. 4, specifically provides that:

"All real property in Ontario shall be liable to taxation subject to the following exemptions:

"(1) [as re-enacted by 1946, c. 3, s. 1(1)] Lands or property belonging to Canada or any Province."

Relating s. 38(1) of the Act back to s. 4(1), it cannot be readily concluded that the Legislature, having recognized and specifically provided for exemption from taxation of Crown lands by s. 4(1), intended by s. 38(1) to deny it.

It is competent for the Province to authorize or empower the municipality to impose a tax upon the interest of a person other than the Crown in lands owned by the Crown. This is established by *Smith v. The Rural Municipality of Vermilion Hills*, [1916] 2 A.C. 569, 30 D.L.R. 83, [1917] 1 W.W.R. 108, and by *The North West Lumber Co. Ltd. v. Municipal District of Lockerbie*, [1926] S.C.R. 155, [1926] 1 D.L.R. 20. It would be equally competent for the Province to authorize the municipality to compute such a tax upon the assessed value of the land.

Likewise, it would be competent to the Legislature of the Province to authorize the imposition of a personal tax, as distinguished from a land tax, upon a person in occupation of Crown lands, either with or without an interest in such lands. The taxation contemplated by s. 38(1), however, is not such a personal tax. It is a tax on land. Subs. 3 of s. 28, as re-enacted by 1946, c. 3, s. 6, says so in these words:

“In addition to the liability of every person assessed under subsection (1) . . . to pay the taxes assessed against the land, the interest in such land, if any, of every person other than the Crown . . . shall be subject to the lien given by section 99 and shall be liable to be sold or vested in the municipality for arrears of taxes.”

I pause to observe the inaccuracy of the language. Taxes are not “assessed against the land”. Taxes are levied upon an assessment of the land. The inaccuracy, however, serves to make the intention of the Legislature even more manifest than it might otherwise have been, *viz.*, that what the Legislature intended by subs. 1 was an assessment on which a tax *in rem* would be levied in contrast to a tax *in personam*.

Because the interest of the Crown in Crown lands is not liable to taxation, s. 38(1) therefore must be construed as authorizing an assessment of Crown lands only where “the tenant” of such lands has an interest therein.



Section 1(o) of The Assessment Act defines "tenant" as including "occupant and the person in possession other than the owner".

I agree with my brother Laidlaw, and for the reasons stated by him, that neither of these appellants is a tenant. Neither of them has any more than a mere licence to reside upon the land. Neither of them has an interest in the lands upon which he is so residing, and because neither of them has any such interest, s. 38(1) of The Assessment Act does not apply.

I would answer the questions in each of the cases stated as follows:

(1) No.

(2) The sum deducted from the appellant's salary or wages is not by way of rent or other valuable consideration for any interest in the land.

(3) He resides upon the lands in an official capacity only, but does not occupy them in law.

(4) Yes.

(5) Yes.

The appeal should therefore be allowed with costs.

*Appeal allowed with costs.*

*Solicitors for the appellants: Hare and Harrison, Delhi.*

*Solicitor for the respondent: W. P. Mackay, Simcoe.*

## [COURT OF APPEAL]

## Re The City of Ottawa and The Township of Nepean.

*Municipal Corporations—Town Planning and Development—Effect of Initiating Proceedings under The Planning Act, 1946 (Ont.), c. 71, as amended by 1947, c. 75—Preparation and Submission of Report by Planning Area Board—Application thereafter for Annexation under The Municipal Act, R.S.O. 1937, c. 266, s. 23(1), as re-enacted by 1947, c. 69, s. 2(1).*

There is no conflict between s. 9(1) of The Planning Act, 1946, and s. 23(1) of The Municipal Act, as re-enacted in 1947. Nor does the fact that a planning area board has been appointed under the former statute, and has submitted a report, in the nature of a preliminary study, affecting several municipalities, preclude an application to the Ontario Municipal Board by the municipality designated to prepare the official plan, for the annexation of parts of another municipality within the planning area. The Municipal Board has jurisdiction, under s. 23(1) of The Municipal Act, as re-enacted in 1947, to make an order for annexation, and this jurisdiction is in no way affected by the fact that proceedings have been initiated under The Planning Act, 1946.

AN APPEAL, by leave of the Court, from an order of the Ontario Municipal Board.

23rd February 1949. The appeal was heard by LAIDLAW, HOPE and HOGG JJ.A.

*C. C. Gibson, K.C.*, for the Township of Nepean, which had formerly supported the appeal, stated at the opening of the argument that his client withdrew from any active participation in the appeal.

*G. C. Medcalf, K.C.*, for the City of Ottawa, respondent: I have a preliminary objection to the hearing of this appeal, based on the fact that no notice of appeal has been served. The only document we have received is the notice of the motion (already disposed of) for leave to appeal, and this notice sets out three grounds, none of which is an attack on the jurisdiction of the Municipal Board.

*V. S. McClenaghan, K.C.* (*H. W. Allen*, with him), for the County of Carleton, appellant: As to the preliminary objection, s. 103 of The Ontario Municipal Board Act, R.S.O. 1937, c. 60, entitles me to appeal only if I raise a question of jurisdiction, and I thought that the notice of motion for leave to appeal sufficiently set out my grounds. [LAIDLAW J.A.: You should have served a notice of appeal, but we will hear the argument on the merits of the appeal.]

The 1947 re-enactment, by c. 69, s. 2(1), of s. 23(1) of The Municipal Act, R.S.O. 1937, c. 266, was not new legislation, since

it was merely a rewording of the section as first enacted by 1939, c. 30, s. 2, and the law was not changed in any way. This being so, The Planning Act, 1946 (Ont.), c. 71, is later legislation of a special sort, and must prevail if there is conflict.

My argument in brief is that the parties having committed themselves to the procedure under The Planning Act, 1946, which is based entirely on conference and co-operation, the compulsory proceedings under s. 23(1) of The Municipal Act were no longer available, and the Municipal Board had no jurisdiction to entertain the application. All interested municipalities had approved the plan submitted by the planning area board before the application was heard by the Municipal Board. [LAIDLAW J.A.: What the Act requires is "adoption" of the plan by the council of the designated municipality. Here you have no adoption, but only approval "in principle".] The fundamental question here is whether the Legislature intended that s. 23(1) could be used as an effective block to proceedings under The Planning Act, 1946.

The application and order under s. 23(1) are in direct conflict with The Planning Act, 1946, which is a special Act in a special field of municipal law, and is later in origin than s. 23(1). Our submission is that where a group of municipalities have taken action under The Planning Act, 1946, no one or more of them is entitled to resort to the wholly different proceedings contemplated by s. 23(1) of The Municipal Act. The two statutes are clearly in conflict, and s. 28*a* of The Planning Act, 1946, as enacted by 1947, c. 75, s. 14, expressly provides that in such case that Act shall prevail.

*G. C. Medcalf, K.C.*, for the City of Ottawa, respondent: There must be something either express or clearly implied in The Planning Act, 1946, if it is to be deemed to have taken away the powers of the Municipal Board under s. 23(1) of The Municipal Act, particularly in view of subs. 12 of s. 23. I submit that there is nothing which does so either expressly or by necessary implication.

The report of the planning area board has been misunderstood. It deals only with one small part of the proposed development, *viz.*, unified control of municipal services within a particular area. The city council approved this report in principle, and then proceeded to follow one of the alternative courses



suggested in it, *viz.*, annexation under s. 23(1). Even if the appellant's argument is correct it cannot apply in the facts of this appeal, because our action is not in conflict with the report, but follows it.

This report was neither submitted nor intended as a basis for a plan to be submitted under The Planning Act, 1946. It does not provide for the planning of the area, but is merely a preliminary study on one aspect of the situation.

*E. H. Silk, K.C.*, for the Ontario Municipal Board (appearing under s. 103 of The Ontario Municipal Board Act, R.S.O. 1937, c. 60): There is no conflict between the Municipal Board and the Minister of Planning and Development, and I am authorized by the Minister to say that he does not feel that he has been deprived of any powers by the action of the Board. The jurisdiction of the Municipal Board was not questioned when this matter was before it. I adopt the argument advanced on behalf of the respondent.

*V. S. McClenaghan, K.C.*, in reply: The stand now taken by the Minister is a reversal of the position taken before the Board by one Bunnell, a part-time employee of the Department of Planning and Development.

*Cur. adv. vult.*

16th March 1949. LAIDLAW J.A.:—This is an appeal by the Corporation of the County of Carleton from an order dated the 6th December 1948, made by the Ontario Municipal Board in the exercise of powers given to it by s. 23(1) of The Municipal Act, R.S.O. 1937, c. 266, as re-enacted by 1939, c. 30, s. 2, and 1947, c. 69, s. 2(1), upon the application of the City of Ottawa, whereby it was ordered that certain lands in the township of Nepean be annexed to the City of Ottawa. An order of this Court, differently constituted, was made on the 12th January 1949, extending the time for making an application for leave to appeal and granting the appellant leave to appeal to this Court.

When the appeal came on for hearing, counsel for the respondent took the preliminary objection that the Court should not entertain the appeal because no notice of appeal was filed or delivered on behalf of the appellant. It appears that certain

grounds of appeal were set forth in the notice of motion to this Court for an order granting leave to appeal, but that no notice of appeal was delivered after leave to appeal was granted by the Court. Counsel for the respondent was not embarrassed by the omission of counsel for the appellant to give a notice of appeal. He had full knowledge of the grounds upon which the appeal is based, and was prepared to proceed with the hearing. The Court declined to give effect to the preliminary objection and proceeded to hear the appeal.

At the conclusion of the hearing the Court reserved judgment and on 24th February we announced that the appeal ought to be dismissed with costs and that reasons for judgment would be given at the earliest possible time thereafter. Accordingly these reasons are now delivered.

The ground of appeal, as presented by counsel in argument, is that the City of Ottawa had no right to make application to the Ontario Municipal Board under s. 23(1) of The Municipal Act, and the Board had no jurisdiction to make an order under that section of the statute in the particular circumstances, which I outline as follows:

An Ottawa Planning Area Board was appointed in accordance with and pursuant to the provisions of s 3 of The Planning Act, 1946 (Ont.), c. 71. That board prepared a report, with two accompanying maps, on the future development of the City of Ottawa and its environs, and under date 12th December 1947, submitted it to the chairman and members of the board of control and the council of the City of Ottawa, to the mayor and council of the Town of Eastview, and to the reeves and members of the councils of the Village of Rockcliffe Park, the Township of Gloucester and the Township of Nepean. It was also submitted to the Minister of Planning and Development. He considered the recommendations contained in the report, and thereafter prepared a memorandum which he sent to the council of each municipality. He sought their views as to the general soundness of the whole plan and particularly as to how it affected each of them. For the guidance of the municipal councils in considering the recommendations in the report, the Minister of Planning and Development drew their attention to certain points, as set forth in a memorandum prepared by him. *Inter alia*, the Minister conveyed to all of the interested munic-

ipal councils the understanding that the adoption and approval of a plan by him did not commit the municipality to any form of amalgamation or merger or annexation or joint control of services. The report of the Planning Area Board was approved "in principle" by the council of each interested municipality. The approval of the City of Ottawa was given on 9th January 1948, and the latest of such approvals was given by the Township of Gloucester on 16th January 1948. The application to the Ontario Municipal Board on behalf of the City of Ottawa is dated 10th January 1948, and the hearing before the Board was on 1st, 2nd and 3rd November 1948. No objection was taken at the opening of the proceedings before the Municipal Board as to the jurisdiction of the Board or as to the right of the City of Ottawa to make the application, but the question was raised during the course of the proceedings and counsel for the appellant pressed the objection in his argument before the Board. The Municipal Board did not deal expressly with the point in the reasons for its decision, but obviously declined to give effect to the objection.

Counsel for the appellant argues that there is a conflict between s. 9(1) of The Planning Act and s. 23(1) of The Municipal Act; that s. 9(1) of The Planning Act is in fact special legislation enacted at a date later than the time when the powers presently set forth in s. 23(1) of The Municipal Act were first conferred upon the Board, and as they appear in the 1939 re-enactment of s. 23(1); that s. 28a of The Planning Act, as enacted by 1947, c. 75, s. 14, expressly provides that in the event of conflict between the provisions of that Act and any other general or special Act, the provisions of The Planning Act shall prevail. He urges that the proceedings taken by the City of Ottawa under s. 23(1) of The Municipal Act conflict and interfere with the proceedings taken with a view to obtaining the approval of the Minister of Planning and Development of the report submitted to him by the Ottawa Planning Area Board; that the result of the application to the Ontario Municipal Board under s. 23(1) is to terminate the steps and proceedings by way of submission of a plan to the Minister of Planning and Development and the voluntary action taken by the various municipalities for the development of the planning area.



If there is a conflict between s. 9(1) and s. 23(1), then of course the provisions of s. 9(1) of The Planning Act must prevail by virtue of s. 28*a* thereof, but I cannot find any such conflict. Section 9(1) must be read with ss. 7 and 8 of the statute. Those sections contemplate an investigation and survey by a planning area board and the performance by the planning area board of duties of a planning nature. In particular, as set forth in s. 7, the planning board is required to: “(a) prepare maps, drawings, texts, statistical information and all other material necessary for the study, explanation and solution of problems or matters affecting the development of the planning area; [and] (d) prepare a plan of the planning area and recommend it to the council for adoption; . . .” When the planning area board in the performance of its duty under s. 7(d), as quoted, has a plan “finally prepared” and has recommended it to the council charged with the duty of formulating an official plan, that council may adopt the plan as provided by s. 8(2) of the statute. It is then that s. 9(1) comes into operation, and “upon adoption the plan shall be submitted by the council to the Minister” who thereupon has certain rights and powers.

No such procedure was followed in this case. The planning area board did not prepare a final plan of the planning area with a view to its adoption as an official plan. The report prepared by it, and the accompanying maps, are plainly initial in character. They are “material necessary for the study, explanation and solution of problems or matters affecting the development of the planning area” and fall plainly within the language of s. 7(a). This is obvious from the text of the report in which it is pointed out that in the view of the planning area board the area described by it ought to be placed under unified control and it is stated: “As to how this unified control is to be obtained, whether by annexation or by the establishment of an inter-urban administrative area or by special legislation, is for the Councils of the municipalities concerned to determine.” There is contained in the report a statement of the available procedure leading up to annexation. An express reference is made to the authority under which one municipality may annex another or several municipalities may be amalgamated with each other as set out in ss. 21, 22 and 23 of The Municipal Act. The text of the report and the accompanying maps are preliminary studies

of a planning nature and do not constitute a final plan for adoption as an official plan under the provisions of The Planning Act. The fact that the City of Ottawa and other interested municipalities approved of the report in principle does not in any way deprive the City of Ottawa of the right given to it under the provisions of s. 23(1) of The Municipal Act to apply to the Ontario Municipal Board for an order annexing to the City of Ottawa part of the adjacent Township of Nepean.

In the absence of any conflict between s. 9(1) of The Planning Act and s. 23(1) of The Municipal Act as urged by counsel for the appellant, the right of the City of Ottawa to make an application under the provisions of s. 23(1) can be taken away from it only by express legislation or by necessary implication therein. Admittedly there is no express provision that a municipality shall not exercise its right to make such an application or that the Board shall have no jurisdiction when a planning area board has proceeded in the manner described in this case, and there is nothing in The Planning Act or elsewhere from which the Court can draw such an inference.

I may add that, in my opinion, the application of the City of Ottawa to the Ontario Municipal Board and the order of the Board now in appeal do not in any way interfere with the performance of the duties of the Ottawa Planning Area Board or the taking of any action it may deem advisable for the development of the planning area, or with the exercise by the Minister of Planning and Development of any rights or powers conferred on him by the provisions of The Planning Act. The object of that legislation can be accomplished, and the provisions thereof can be employed, to the same extent and in the same manner as if no proceedings had been taken by the City of Ottawa under s. 23(1) of The Municipal Act and no order had been made by the Board thereunder. This view is in accord with that of the Minister of Planning and Development as stated, on his instructions, by counsel appearing on the argument of this appeal for the Ontario Municipal Board.

The appeal should be dismissed with costs. Counsel for the Ontario Municipal Board appeared pursuant to the right of the Board to be heard upon the argument of the appeal, as provided in s. 103(4) of The Ontario Municipal Board Act, R.S.O. 1937, c. 60, and opposed the appeal. I think the Board ought to be

allowed its costs. The Corporation of the Township of Nepean appeared by counsel before the Ontario Municipal Board and opposed the application of the City of Ottawa. It had notice of the motion made on behalf of the County of Carleton for an order extending the time for making an application for leave to appeal to this Court and for leave to appeal, and counsel for the Township supported the motion. After that order as applied for was made (12th January 1949) counsel, on its behalf, prepared and filed in this court a statement of facts and law, wherein it is stated that "The Corporation of the Township of Nepean supports The Corporation of the County of Carleton in its appeal, upon a question of jurisdiction, from the decision of the Ontario Municipal Board dated December 6th, 1948." When the appeal came on for hearing counsel for the Township stated to the Court that the Township did not intend to take any part in the appeal. Under the circumstances I think there should be no order as to costs in favour of or against the Township of Nepean.

HOPE J.A.:—Immediately following the argument herein the Court indicated that it was unanimously of the opinion that the appeal should be dismissed, and that the reasons for such dismissal would be delivered later. I have now had the privilege of reading the reasons written by my brothers Laidlaw and Hogg, each of whom arrived at the same conclusion, save as to costs.

It is unnecessary for me to review the facts again. I am fully in accord with the reasons of my brother Laidlaw and his directions as to costs, save as to those of the Township of Nepean, and in respect of these latter I agree with the directions of my brother Hogg.

HOGG J.A.:—On the 10th June 1948 the Corporation of the City of Ottawa, pursuant to s. 23(1) of The Municipal Act, R.S.O. 1937, c. 266, as re-enacted by 1947, c. 69, s. 2(1), made application to the Ontario Municipal Board for an order annexing to the City of Ottawa a certain portion of the Township of Nepean, in the county of Carleton, as described in the notice of application. After hearing counsel upon the application, the Municipal Board gave their approval of the request of the aforesaid City, by order dated the 6th December 1948.



The Planning Act, 1946, c. 71, and an amending Act of 1947 (c. 75), passed by the Legislature of the Province of Ontario, provide for a planning board to carry out definite and detailed plans for the development of either a single municipality or more than one municipality, within the Province of Ontario. The Act, by s. 2, provides for an application by a municipality to the Minister of Planning and Development to define and name a planning area, and in pursuance of this provision the Corporation of the City of Ottawa made application to the Minister to define and name a planning area to embrace that city and several adjacent municipalities. Such area was defined by the Minister, who designated the City of Ottawa to formulate the official plan and a planning board was appointed in pursuance of s. 3 of the statute, such board being named "The Ottawa Planning Area Board".

Section 7 of the statute provides the duties to be performed by the board, culminating in the preparation of a plan of the area, which is to be submitted for adoption to the council of the corporation designated by the Minister to formulate the official plan. That the plan is, in the first place, to be submitted for adoption only to the council of the municipality designated to formulate the official plan, would seem to be clear from the provisions of the Act. By s. 9(1) the plan, when finally prepared and after adoption, is to be submitted to the Minister and is then to be referred by him to the council of every municipality in the planning area. In my opinion, the language of s. 9(1) indicates that the adoption of the plan, as finally prepared by the designated municipality, by the other interested municipalities is to be signified by them after the plan has been referred to them by the Minister.

On the 12th December 1947 the Ottawa Planning Area Board submitted a report to the council of the City of Ottawa and, according to the report, also to the municipalities of Eastview and Rockcliffe Park, the Township of Gloucester and the Township of Nepean. According to the evidence given on the hearing of the application by the Municipal Board, the report was referred to the councils of the municipalities adjacent to the City of Ottawa by the Minister, although the report itself is also directed to all of the interested municipalities by the Ottawa Planning Area Board.

This report of the Ottawa Planning Area Board would appear to be in the nature of a preliminary report upon the general scheme rather than the final plan referred to in ss. 8 and 9 of The Planning Act. In an appendix to the report is included a letter of the Minister of Planning and Development to the City of Ottawa and a memorandum which sets forth certain views of the Minister and conclusions reached by him concerning the proposed plan and the carrying out of the provisions of the statute in relation to such plan. This letter and memorandum were written, it would appear, in consequence of a meeting between the Minister and the municipalities on the 27th December 1948. The council of the City of Ottawa gave its approval in principle of the report on the 9th January, subject to certain conditions and stipulations contained in the memorandum of the Minister to which reference has been made, and again on the 17th May, "reaffirm[ed] its endorsement of the report of the Ottawa Planning Area Board". The other municipalities to which the report was addressed by the Planning Area Board, and to which it was also referred by the Minister, gave their approval in principle during the month of January 1948. It would seem that the report or plan was adopted in principle only, because of the conditions contained in the aforesaid memorandum and letter of the Minister, made part of the appendix to the report, which indicate that consideration is to be given to certain conditions and that additional matters are to be determined, by the City of Ottawa as well as the other interested municipalities.

Section 9 of The Planning Act provides that:

"(1) Upon adoption the plan shall be submitted by the council to the Minister who may refer the plan to any department of the public service of Ontario that may be concerned therewith and to The Hydro-Electric Power Commission of Ontario, and where the planning area consists of more than one municipality, the Minister shall refer the plan to the council of every municipality in the planning area, and if modifications appear desirable, settle such modifications as far as possible to the satisfaction of all concerned and cause the plan to be amended accordingly.

“(2) The Minister may then approve the plan, whereupon it shall be the official plan of the planning area.”

The steps contemplated by the above-quoted section have not yet been taken and the procedure outlined by the statute was not followed. The plan has not been approved by the Minister as provided by the terms of s. 9(2).

A motion on behalf of the County of Carleton was made to this Court for leave to appeal from the said order of the Ontario Municipal Board annexing the portion of the Township of Nepean to the City of Ottawa, and to extend the time within which application for leave might be made, and the time was extended and leave to appeal was granted on the 12th January 1948.

The appeal now under consideration is made by the County of Carleton from the aforesaid order of the Municipal Board upon the ground that the Board was without jurisdiction to hear the application by the City of Ottawa for the annexation of that portion of the Township of Nepean described in the application and order. The application for the aforesaid annexation was made according to the provisions of s. 23(1) of The Municipal Act, as amended, which confers authority on the Municipal Board, upon the application of a municipality which has been authorized by by-law of its council, to order, on such terms as it may deem expedient, the annexation of the whole, or any part or parts, of any other municipality to the municipality making application.

It is contended by counsel for the County of Carleton that the provisions of this section of The Municipal Act could not properly be invoked because of the proceedings which had already been taken by the City of Ottawa and the other interested municipalities under the provisions of The Planning Act and because of the further steps to be taken under the latter Act leading up to the making of the official plan of the planning area. It is argued that there is a conflict between the terms of The Planning Act, with special reference to s. 9, and s. 23(1) of The Municipal Act, and that because of s. 28a of The Planning Act, as enacted by 1947, c. 75, s. 14, the provisions of that Act shall prevail. Section 28a reads:

“28a. In the event of conflict between the provisions of this and any other general or special Act, the provisions of this Act shall prevail.”



Mr. McClenaghan argued that the present s. 23(1), which was enacted in 1947, is similar to the amendment of The Municipal Act made in 1939 by c. 30, s. 2, and that therefore s. 23(1) was in force before The Planning Act came into existence. He argued that upon the approval in principle being given to the aforesaid report by the City of Ottawa and the several municipalities affected by it, such municipalities were committed to proceed, and had the right to proceed, under the terms of The Planning Act and none of such municipalities could invoke the powers given by s. 23(1) of The Municipal Act. Mr. McClenaghan contended that because s. 23(1) of The Municipal Act could not, in the circumstances, be invoked, the Municipal Board was, as a consequence, without power to entertain the application for the annexation of the portion of the Township of Nepean in question or to make the order of the 6th December 1948.

If it be assumed that the Ottawa Planning Area Board has undertaken and carried out all of the duties cast upon it by s. 7 of the statute and if the report submitted by the board to the council of the city and the other interested municipalities is such a plan as is contemplated by that section as the final plan, and if it be further assumed that the procedure laid down in The Planning Act has been followed with respect to the adoption of the plan, nevertheless the various matters enumerated in s. 9(1) have not all been initiated or carried to completion. The plan has not yet been made the official plan of the planning area as provided by s. 9(2) of the statute.

As I understand the problem presented to the Court for solution in this appeal, it is whether, in view of the various steps which have been taken to date under The Planning Act, and before all of the matters and requirements set out in s. 9 of the Act have been considered or carried out, the provisions of s. 23(1) of The Municipal Act can be invoked by the City of Ottawa, which is the municipality designated by the Minister of Planning and Development to formulate the official plan. If the provisions of s. 23(1) of The Municipal Act conflict with the provisions of The Planning Act, and especially with s. 9(1), then in such case, because of s. 28*a* of the latter Act, its provisions must prevail.

It is contended by Mr. McClenaghan that there is a direct conflict between the authority given to one municipality to annex

another by s. 23(1) of The Municipal Act, and s. 9(1) of The Planning Act.

Referring for the moment to the sections of the latter Act other than s. 9(1), I fail to find any such conflict. There is no condition or requirement of s. 9(1) which in my opinion is qualified or modified, or which is affected, by the order of the Municipal Board annexing a part of the Township of Nepean to the City of Ottawa. The council of that City was designated by the Minister to formulate the official plan. The provision that after the adoption of the plan, and its submission to the Minister, he may refer it to certain departments of the public service of Ontario and to The Hydro-Electric Power Commission of Ontario would not be modified or affected because part of one of the municipalities in the planning area is taken from such municipality and annexed to the designated municipality. The provision that any modifications of the plan may be settled as far as possible to the satisfaction of all concerned has not been and, in my view, cannot be affected or disturbed by the aforesaid annexation.

This Court has not been shown in what manner the annexation of a part of the Township of Nepean by the City of Ottawa conflicts with any of the matters embraced within the ambit of s. 9(1) or other sections of The Planning Act.

My conclusion is that there is no conflict between s. 9 of The Planning Act and s. 23(1) of The Municipal Act, as is contended by counsel for the County of Carleton, nor am I able to hold that any other of the provisions of The Planning Act takes away the right of the City of Ottawa to make the application in question made by it to the Municipal Board, or the right of the Municipal Board to hear and to determine that application.

The appeal should be dismissed with costs to the Corporation of the City of Ottawa. Prior to the hearing of the appeal the Township of Nepean had decided that it would neither support nor oppose the appeal and I, therefore, do not think it is entitled to be awarded the costs of being represented by counsel upon the hearing of the appeal, but is entitled only to costs of the appeal, if any, incurred before the hearing of the appeal. I do not think it was necessary that the Ontario Municipal Board

should be represented by counsel upon the hearing of the appeal and it should not have the costs of such appearance.

*Appeal dismissed with costs.*

*Solicitors for the County of Carleton, appellant: McNulty, Charleson & McClenaghan, Ottawa.*

*Solicitor for the City of Ottawa, respondent: Gordon C. Medcalf, Ottawa.*

*Solicitor for the Ontario Municipal Board: E. H. Silk, Toronto.*

*Solicitors for the Township of Nepean: Honeywell, Baker, Gibson & Wotherspoon.*

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[COURT OF APPEAL.]

**Re Courneys and The Village of Tweed.**

*Elections—Recounts—Position of County Court Judge on Recount — Appeal—The Municipal Act, R.S.O. 1937, c. 266, s. 142 — The County Courts Act, R.S.O. 1937, c. 103, s. 37(1)—The Judicature Act, R.S.O. 1937, c. 100, s. 1(o), (l)—The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123.*

*Intoxicating Liquors—Plebiscites—Recounts—Position of Judge on Recount—Appeal—The Liquor Licence Act, 1946 (Ont.), c. 47, ss. 69, 80 (as amended by 1947, c. 59, s. 4).*

There is no appeal from the decision of a judge and his certification of the result of a vote following a recount under s. 142 of The Municipal Act (made applicable to plebiscites under The Liquor Licence Act, 1946, by s. 80 thereof). If the judge on such a recount acts as *persona designata*, no appeal is authorized by s. 3(1) of The Judges' Orders Enforcement Act, since it is clear that his decision is not such an "order" as is contemplated by that Act. Per Hogg J.A. (the other members of the Court expressing no opinion on this point): The judge does act as *persona designata* in conducting such a recount. Per LAIDLAW and HOPE JJ.A.: If the judge does not act as *persona designata*, there is no right of appeal under s. 37(1) of The County Courts Act, since his decision is not a "decision or order of a judge in court or chambers", within clause *a* of the subsection, nor is it made in a "cause or matter", so as to come within clause *b*, interpreting those words according to s. 1 of The Judicature Act.

AN APPEAL by E. J. Courneys from the decision of Anderson Co. Ct. J. on a recount of votes cast on a plebiscite held in the village of Tweed under s. 69(1) of The Liquor Licence Act, 1946 (Ont.), c. 47.



16th February 1949. The appeal was heard by LAIDLAW, HOPE and HOGG JJ.A.

[At the opening of the appeal counsel for the respondents took a preliminary objection that no appeal lay, and the argument is noted only on this point.]

*B. R. Collins*, for the respondents: A judge acts as *persona designata* under ss. 142 and 143 of The Municipal Act, R.S.O. 1937, c. 266 (made applicable by s. 80(2) of The Liquor Licence Act, 1946 (Ont.), c. 47, as enacted by 1947, c. 59, s. 4), and the only possible right of appeal would be under The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123. But before there can be an appeal under that Act there must be an "order" within its contemplation. A judge on a recount makes no order and delivers no judgment, and there is nothing which can be enforced like a judgment of the Court. His duties are set out particularly in subss. 10 and 11 of s. 142. He merely makes a finding, upon which the clerk proceeds. [HOGG J.A.: What have you to say about the decision in *Re the Election for St. Patrick's Riding*, [1934] O.W.N. 492?] There are special provisions as to appeals in The Election Act, R.S.O. 1937, c. 8, s. 144, which are not applicable here. This case is similar to *Re McCauley*, [1947] O.W.N. 93, [1947] 1 D.L.R. 766.

*J. R. Cartwright, K.C.* (*W. L. Henderson*, with him), for the appellant: Whether or not the judge was acting as *persona designata*, we have a right of appeal. If he was so acting, we are entitled, having obtained leave, to appeal under The Judges' Orders Enforcement Act. The order in appeal is one of considerable importance, involving the right of the people of the village of Tweed to drink. *Re McCauley, supra*, is distinguishable, since in that case the judge only made a report, on which the Deputy Minister of Health might exercise his discretion. Here, once the judge certifies the result, the clerk is imperatively required to declare the result in accordance with the certificate.

On the other hand, if the judge was not acting as *persona designata*, we are entitled to appeal under s. 37(1) of The County Courts Act, R.S.O. 1937, c. 103. The test, as laid down in 6 C.E.D. (Ont.), 1930, p. 514, appears to be whether the judge was acting as a judge or as a Court: *Re Hunt and Lindensmith*

(1921), 51 O.L.R. 320, 67 D.L.R. 240; *The Canadian Northern Ontario Railway Company v. Smith* (1914), 50 S.C.R. 476, 22 D.L.R. 265. If he was acting as a Court, there is a right of appeal: *Re The Town of Niagara and Kirby et al.*, [1933] O.R. 174, [1933] 2 D.L.R. 60. In the *St. Patrick's Election* case, *supra*, it was an interlocutory order. [HOGG J.A.: What about s. 191 of The Municipal Act? Has it any application?] There is no question here of the validity of the vote. [HOGG J.A. referred to *Re Ellis and Town of Renfrew* (1911), 23 O.L.R. 427.] Section 80(1) of The Liquor Licence Act, 1946, concerns a challenge to the whole vote, while s. 80(2), as enacted by 1947, c. 59, s. 4, applies to a recount, and ss. 142 and 143 of The Municipal Act are the only ones applicable in the latter case.

Since the sections themselves do not deal with the question of a right of appeal, we must look at other legislation. I refer to The Interpretation Act, R.S.O. 1937, c. 1, s. 33; The Judicature Act, R.S.O. 1937, c. 100, s. 1(1), and ss. 36 and 37 of The County Courts Act.

*B. R. Collins*, in reply: The right to drink does not depend upon the ruling of the judge, but upon the legislation and the result of the vote. The judge must have been acting as *persona designata*; he was clearly not acting as judge of the Court. Section 3(1)(b) of The Judges' Orders Enforcement Act refers to an appeal from "such an order", and the whole question is whether or not this decision is "such an order". If it is not, the fact that leave was given is wholly immaterial, and the leave is ineffective.

*Cur. adv. vult.*

18th March 1949. LAIDLAW J.A.:—The council of the Village of Tweed submitted the following question to a vote of qualified persons as provided by s. 69(1) of The Liquor Licence Act, 1946 (Ont.), c. 47, namely:

"Are you in favour of the sale of beer only under a public house license for consumption on licensed premises to which men only are admitted?"

The return made by the returning officer showed that fewer than three-fifths of the electors voting on the question voted in the affirmative as required by s. 69(3) of the statute. A request was made by a voter, Edward Joseph Courneys, for a recount of

the vote under the provisions of s. 142 of The Municipal Act, R.S.O. 1937, c. 266, as made applicable by s. 80 of The Liquor Licence Act, as amended by 1947, c. 59, s. 4. The recount was made by His Honour Judge J. C. Anderson, Judge of the County Court of the County of Hastings, in which the municipality of Tweed is situate, and under date the 27th September 1948 he certified the result of his recount as required by s. 142(10) of The Municipal Act. The result as so certified was that "the total number of valid affirmative votes cast constituted less than the three-fifths majority of the total valid votes cast required by Section 69 of The Liquor Licence Act, subsection (3)".

Under date the 9th October 1948 Edward Joseph Courneys gave notice of appeal to this Court "from the Order pronounced by His Honour Judge J. C. Anderson the 27th day of September, 1948". Subsequently, on the 19th October 1948, Judge Anderson made an order, *inter alia*, "that the said E. J. Courneys do have leave to appeal to the Court of Appeal from my Order pronounced herein on the 27th day of September, 1948", and "that the Respondent do have leave to cross-appeal upon the said Order of the 27th day of September, 1948".

When the appeal came on for hearing, counsel for the negative voters took the preliminary objection that no appeal lay to this Court from the result of the recount of Judge Anderson. The question was fully argued. The Court reserved its judgment in respect of the question raised by the preliminary objection, and proceeded to hear argument of counsel upon the merits of the question in controversy, upon the assumption that it possessed jurisdiction to entertain the appeal in the circumstances. Upon the conclusion of the hearing, it was the unanimous opinion of the members of the Court that the appeal failed on its merits and that opinion was thereupon announced. The Court took further time to consider the question as to its jurisdiction, and in compliance with the request made by counsel delivers these reasons for judgment.

Counsel for the appellant maintained that a right of appeal to this Court from the finding or result of the recount by Judge Anderson is found in one or the other of two statutes, and his argument in brief is as follows: If his Honour acted as *persona designata* in making a recount of ballots under the provisions of s. 142 of The Municipal Act, an appeal from the result of the



recount and certification thereof lies to this Court by leave given under the provisions of The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123; if his Honour did not so act as *persona designata*, an appeal lies to this Court under the provisions of The County Courts Act, R.S.O. 1937, c. 103, s. 37.

I think it is unnecessary to determine the question whether or not Judge Anderson acted as *persona designata* under the provisions of s. 142 of The Municipal Act, because I have reached the conclusion that no appeal lies to this Court under the provisions of either of the statutes relied upon by counsel for the appellant.

The Judges' Orders Enforcement Act is applicable to "orders" made by a judge where jurisdiction is given to him as *persona designata*. It provides for the entry of such orders "in the same way as orders made by him in matters pending in the court of which he is a judge" and for the enforcement of his orders "in the same way as judgments of the court". There is express provision that an appeal shall lie in certain cases "from any such order to the Court of Appeal". But, in my opinion, the result of a recount as found by a judge under the provisions of s. 142 of The Municipal Act is not an order made by him, within the scope and application of the provisions of The Judges' Orders Enforcement Act. When one examines the provisions of s. 142, it becomes apparent that a judge who makes a readdition or recount of ballot papers pursuant thereto is not required or empowered upon completion thereof to make an order of the kind falling within the provisions of The Judges' Orders Enforcement Act. What he does is to make a finding in the nature of a report.

The judge's principal duty is stated in s. 142(8) as follows: ". . . the judge shall proceed according to the provisions for the counting of the ballot papers and the vote at the close of the poll by a deputy returning officer, and shall verify and correct the statement of the poll." Under subs. 10 of s. 142 it is provided that: "Upon the completion of the recount the judge shall . . . forthwith certify the result of the recount or readdition to the clerk."

The finding and certification by the judge showing the result of the recount or readdition as required by subs. 10 is not a direction, demand, decree or order of any kind that is capable

of being “enforced in the same way as judgments of the court”. It simply establishes a correct statement of the poll. I refer to *Re McCauley*, [1947] O.W.N. 93, [1947] 1 D.L.R. 766. I may add that the order made by His Honour Judge Anderson under date the 19th October 1948, purporting to grant leave to E. J. Courneys to appeal to this Court is of no effect, and the reference therein to an “order” as made by his Honour on the 27th September 1948 is incorrect.

Under s. 37(1) of The County Courts Act, an appeal lies to the Court of Appeal “at the instance of any party to a cause or matter from, — (a) every decision or order of a judge in court or chambers . . . (b) every decision or order in any cause or matter disposing of any right or claim”. The words “cause” and “matter” are defined in The Judicature Act, R.S.O. 1937, c. 100, s. 1, as follows:

“(b) ‘Cause’ shall include an action, suit or other original proceeding between a plaintiff and a defendant; . . .

“(l) ‘Matter’ shall include every proceeding in the court not in a cause”.

In *Re Bulmer* (1926), 30 O.W.N. 71, it was held that an arbitrator acting under the provisions of The Public Works Act, R.S.O. 1914, c. 35, in respect of compensation for lands expropriated for highway purposes was not acting in a cause or matter.

In *Re Hunt and Lindensmith* (1921), 51 O.L.R. 320 at 322, 67 D.L.R. 240, it was held that a proceeding under The Children of Unmarried Parents Act, now R.S.O. 1937, c. 217, resulting in an order under s. 14 of that Act, was not a “cause” or “matter” within the definition contained in s. 1 of The Judicature Act quoted above.

In *Re Guardian Realty Co. of Canada Ltd. and The City of Toronto*, [1934] O.R. 266, [1934] 2 D.L.R. 721, it appears that a landowner appealed to the Court of Appeal from an order of a County Court Judge dismissing an appeal from an order of a court of revision confirming an assessment made pursuant to The Assessment Act. It was held that s. 37 of The County Courts Act did not confer a right of appeal because it related to a judicial decision in any “cause or matter” as interpreted by s. 1 of The Judicature Act.

The recount made by Judge Anderson is plainly not a cause or matter within the meaning of s. 37(1) of The County Courts Act as interpreted by s. 1(b) and (l) of The Judicature Act. In any event, the certification by Judge Anderson is not a "decision or order of a judge in court or chambers" within the meaning and scope of s. 37(1)(a) and is not a "decision or order" within s. 37(1)(b) of The County Courts Act.

My conclusion is that there is no appeal to this Court from a judge who makes a recount and certifies the result thereof under the provisions of s. 142 of The Municipal Act. Therefore, I would direct that the appeal be quashed for want of jurisdiction. The respondents should be allowed only the costs of a motion to quash the appeal.

HOPE J.A. concurs with LAIDLAW J.A.

HOGG J.A.:—This is an appeal by one Edward Joseph Courneys from the decision of His Honour Judge Anderson of the County Court of the County of Hastings, upon a recount of the ballots cast with respect to a vote under The Liquor Licence Act, 1946 (Ont.), c. 47, as amended, at the village of Tweed in the Province of Ontario, on the 25th August 1948.

The recount was held by Judge Anderson on the 18th September 1948, and on the 27th September he certified the result of the aforesaid recount, finding that the total number of valid votes cast for the affirmative was 494 and the total number of valid votes cast for the negative was 333, making a total of valid votes cast of 827. The total number of valid votes cast for the affirmative constituted less than the three-fifths majority of the total valid votes cast, required by s. 69(3) of The Liquor Licence Act before a licence could be lawfully issued within the municipality.

A preliminary objection was raised by Mr. Collins. He contended that this Court was without jurisdiction to hear the appeal, as no right of appeal lay from the certificate granted by the County Judge. The determination of this objection was reserved and the Court, assuming that it had jurisdiction, heard the appeal upon the merits, and dismissed it forthwith.

Counsel requested that in view of the importance of the question whether a right of appeal lay to this Court from a



recount of ballots cast with respect to a vote held under The Liquor Licence Act, such question should be considered and determined.

Section 76 of The Liquor Licence Act, reads as follows:

“(1) Except as otherwise provided by this Act, the provisions of *The Election Act* and *The Voters' Lists Act* respecting,—

“(a) the preparation and revision of the lists;

“(b) the time and manner of holding the poll;

“(c) the holding of advance polls;

“(d) the forms to be used and the oaths to be administered;

“(e) the powers and duties of returning officers, deputy returning officers and poll clerks,

and all the provisions relating to corrupt practices, illegal acts, offences and penalties and their prosecutions shall apply to the taking of a vote submitted under this Act.”

By s. 144(7) of The Election Act, R.S.O. 1937, c. 8, an appeal from a recount may be made to a judge of the Court of Appeal. No right of appeal is given under this statute to the Court of Appeal, but only to a judge of that Court.

Section 80 of The Liquor Licence Act, as amended by 1947, c. 59, s. 4, provides that where the validity of a vote on any question or questions submitted under the Act is questioned, the provisions of Part IV of The Municipal Act shall apply and that where a recount of a vote on any question or questions submitted under The Liquor Licence Act is requested, the provisions of ss. 142 and 143 of The Municipal Act shall apply.

If it could be considered that the validity of the vote, upon any question submitted under The Liquor Licence Act, was questioned upon the proceedings for the recount, then in such case, s. 191 of The Municipal Act, which is included in Part IV of that statute, would apply and the appeal would be to a judge of the Supreme Court.

It was argued by Mr. Cartwright that the County Court Judge acting upon a recount under The Liquor Licence Act could not be held to be *persona designata*, and that an appeal would lie to the Court of Appeal from his certificate, by virtue of s. 37(1) of The County Courts Act, R.S.O. 1937, c. 103, which provides that:

“An appeal shall also lie to the Court of Appeal at the instance of any party to a cause or matter from, —

“(a) every decision or order of a judge in court or chambers under any of the powers conferred upon him by any rules of court or by any statute, unless provision is therein made to the contrary”.

If it were assumed that the judge is not acting as *persona designata*, it would be necessary to consider whether a recount of votes under The Liquor Licence Act is a “cause or matter”. These words are defined by the interpretation section of The Judicature Act, R.S.O. 1937, c. 100. Middleton J. in *Re Hunt and Lindensmith* (1921), 51 O.L.R. 320, 67 D.L.R. 240, held that an order made by a County Court Judge under The Children of Unmarried Parents’ Act was not made in a cause or matter as these words are defined by The Judicature Act, and held that the judge was there acting as *persona designata*.

I have reached the conclusion that the County Court Judge upon a recount of votes held under the authority of The Liquor Licence Act, to which said recount the provisions of ss. 142 and 143 of The Municipal Act are made to apply, is acting as *persona designata*.

In *McLeod v. Noble et al.* (1897), 28 O.R. 528, a motion to commit the returning officer and Mr. Dalton McCarthy, Q.C., who had acted at a recount of ballots as agent for a candidate for election as a member of the House of Commons, was heard by a Divisional Court consisting of Boyd C., Meredith C.J. and MacMahon J. A recount of votes cast in an election for the House of Commons was authorized by The Dominion Elections Act, R.S.C. 1886, c. 8, s. 64. The machinery or proceedings respecting such recount, set forth in the said section of The Dominion Elections Act, was very similar to the provisions of s. 142 of The Municipal Act. In the course of his judgment the learned Chancellor, who delivered the judgment of the Court, said:

“The provisions as to a recount before a county or district Judge as *persona designata* in our statute appear to be peculiar to Canada and are not found in English legislation.”

He also said that a judge in proceeding with a recount was a quasi-judicial officer.

The language used by Fitzpatrick C.J.C. in *The Canadian Northern Ontario Railway Company v. Smith* (1914), 50 S.C.R.

476, 22 D.L.R. 265, would seem to be apt in describing the character of the functions of a judge upon a recount under The Liquor Licence Act. He said, at p. 479:

“Here the judge to whom the application was made under the Dominion ‘Railway Act’ was, it is true, a judge of the Superior Court of the Province, but for the purposes of that application his jurisdiction was ‘special and peculiar, distinct from, and independent of any power or authority with which he is clothed as a judge of that court.’ The Act conferring jurisdiction upon him provides all necessary materials for the full and complete exercise of such jurisdiction in a very special manner, wholly independent of, and distinct from, and at variance with, the jurisdiction and procedure of the court to which he belongs (Sections 194, 195, 196, 197 et seq. ‘Railway Act’).”

Section 142 of The Municipal Act provides a special, full and complete procedure for the holding or taking of a recount of votes cast, at variance with the ordinary procedure in a cause or matter in the County Court, and it is directed solely to the taking of such recount. The statutory powers and duties respecting a recount are, in my opinion, given to judges of County Courts as judges, and are not given to the Court. The judge derives his jurisdiction directly from the statute.

In the case of *Re the Election for St. Patrick's Riding* [1934] O.W.N. 492, Mr. Justice Fisher, sitting in Weekly Court, held that a County Court Judge holding a recount of ballots cast, under the provisions of The Ontario Election Act, was not acting as *persona designata*. Doubtless the judgment of the Divisional Court in *McLeod v. Noble et al.*, *supra*, was not brought to the attention of the learned judge. With the greatest respect, I think the judgment of the Divisional Court is to be followed and I agree with the opinion expressed by the Chancellor.

The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123, gives a right of appeal to the Court of Appeal, under certain conditions, from orders made by a judge acting as *persona designata*. Section 1 of that statute refers to orders made by a judge as *persona designata*. Section 3(1) reads in part:

“An appeal shall lie from any such order to the Court of Appeal, —

“(a) when the right of appeal is given by the statute under which the judge acts; or



“(b) when no such right of appeal is given, then by leave of the judge making the order or by leave of a judge of the Supreme Court.”

On the 19th October 1948, upon an application made on behalf of Courneys to Judge Anderson, before whom the recount had previously been held, an order was made granting the said Courneys leave to appeal to the Court of Appeal, “from my Order pronounced herein on the 27th day of September, 1948”.

Section 142 of The Municipal Act, by subs. 10, provides that upon the completion of the recount, the judge shall certify the result of such recount or readdition to the clerk. Mr. Collins argued that the certificate given by the learned County Court Judge, as provided by s. 142 of The Municipal Act, cannot be held to be an “order”, and, for the reason that an appeal lies only from an order made by a judge as *persona designata*, if leave is granted, the provisions of The Judges’ Orders Enforcement Act do not apply to the present case.

The decision of a Court culminates in the issuing of an order, or judgment.

In *Fawkes et al. v. Swayzie* (1899), 31 O.R. 256, Armour C.J., referring to The County Courts Act in force at that time, which provided that an appeal should be set down for argument after the expiration of one month from “the judgment, order, or decision complained of”, said that the word “decision” meant the judicial opinion, oral or written, pronounced or delivered, upon which the judgment or order was founded, and the “judgment or order” was the embodiment in legal procedure of the result of such decision.

It is true that the certificate given by the County Court Judge as the result of a recount of ballots is a “decision” as to the number of votes cast, but it is not a decision upon which a judgment or order is founded.

I am unable to conclude that the certificate provided for by s. 142(10) of The Municipal Act is an “order” as that term is used in The Judges’ Orders Enforcement Act. By s. 1(1) of the statute orders made by a judge as *persona designata* “shall be entered in the same way as orders made by him in matters pending in the court of which he is a judge and may be enforced in the same way as judgments of the court”. It is an order of

such character from which an appeal will lie under s. 3(1) of the aforesaid Act. The certificate given by the judge under s. 142(1) of The Municipal Act is not something which may be entered in the same way as orders made by him in matters pending in the court of which he is a judge, nor may it be enforced in the same way as a judgment of the Court.

For the above reasons I have concluded that there is no appeal by virtue of the provisions of The Judges' Orders Enforcement Act to this Court from a recount of ballots. If such appeal did lie, then the anomalous circumstance would arise, namely, that where the validity of a vote is questioned, and Part IV of The Municipal Act is applied, the decision of a Supreme Court Judge is final; also an appeal from a recount under The Election Act is to a judge of the Court of Appeal and not to the full Court, but an appeal from a recount of votes cast under The Liquor Licence Act would lie to the full Court of Appeal.

For the above reasons, I am of the opinion that this Court has no jurisdiction to entertain the appeal.

*Appeal quashed.*

*Solicitors for the appellant: Robb, Park & Ross, Belleville.*

*Solicitor for the respondents: B. R. Collins, Tweed.*

## [COURT OF APPEAL.]

## Croft v. Prendergast.

*Sale of Land—House in Course of Construction—Implied and Express Warranties—Defective Workmanship and Construction—Rights of Parties.*

Where a contract is made for the sale of a house then in course of construction, and the vendor expressly agrees "that the house and grounds will be completed in a workmanlike manner", this warranty is to be applied not only to the work that remains to be done, but also to what has been apparently completed before the making of the contract. It will therefore be no answer to a claim for damages for defective workmanship and construction that the plaintiff inspected the house before entering into the contract, and later completed the contract and paid the balance of the purchase price. The vendor in such circumstances agrees to do two things, *viz.*, (1) to complete the house in a workmanlike manner, and (2) to convey the property to the purchaser. The fact that the vendor has performed the second part of this agreement does not prevent the purchaser from enforcing performance of the first part, which is collateral thereto. *Lawrence v. Cassel*, [1930] 2 K.B. 83, applied; *Redican et al. v. Nesbitt*, [1924] S.C.R. 135, distinguished; *Perry v. Sharon Development Co., Ltd.*, [1937] 4 All E.R. 390, referred to.

Even if the warranty above quoted were to be more narrowly construed, and it were deemed to refer only to work still to be done, there would still be an implied warranty to the same effect, as to the work done before the making of the contract, unless such an implied warranty was excluded. *Miller v. Cannon Hill Estates, Limited*, [1931] 2 K.B. 113, referred to.

*County Courts—Jurisdiction—Counterclaim—Costs—The County Courts Act, R.S.O. 1937, c. 103, ss. 19, 20.*

Section 19(2) of The County Courts Act cannot, in view of s. 20, be applied to a counterclaim. Where, therefore, a plaintiff claims an amount within the jurisdiction of a County Court, and a defendant counterclaims for an amount beyond that jurisdiction, the County Court Judge has no jurisdiction, if he finds in favour of the defendant on the counterclaim (no proceedings having been taken under s. 20 to have it removed into the Supreme Court), to award costs on the Supreme Court scale to the successful defendant. *Martin Transports Ltd. v. Moir*, [1936] O.R. 99, not followed. (Per ROBERTSON C.J.O. and ROACH J.A.; HOPE J.A. *contra*.)

AN APPEAL by the plaintiff from the judgment of McDonagh Co. Ct. J., of the County Court of the County of York.

2nd March 1949. The appeal was heard by ROBERTSON C.J.O. and ROACH and HOPE JJ.A.

*E. C. Bogart, K.C.*, for the plaintiff, appellant: This should be construed as a contract for a completed house, and the defendant has only two serious complaints, *viz.*, the lack of waterproofing in the basement, and our failure to put tiling around the house. [ROBERTSON C.J.O.: The trial judge took the view that the house was to be completed throughout in a workmanlike manner.] The defendant made a complete inspection before he offered to buy



the property, and the doctrine of *caveat emptor* should be applied: *Redican v. Nesbitt et al.*, [1924] S.C.R. 135, [1924] 1 D.L.R. 536, [1924] 1 W.W.R. 305. [ROBERTSON C.J.O.: But in that case there was no such express contractual obligation as there is here.] The judgment of Duff J. in that case is still the law. I rely also on *Hoskins v. Woodham*, [1938] 1 All E.R. 692 at 695, and *Perry v. Sharon Development Co., Ltd.*, [1937] 4 All E.R. 390. The contract merged in the deed, and, the sale having been completed, there is an end of the matter, in the absence of fraud or misrepresentation.

*R. F. Wilson, K.C.*, for the defendant, respondent: The trial judge found that there was misrepresentation both as to weeping-tile and as to waterproofing. The house was to be completed throughout in a workmanlike manner. It was not completed by the date specified in the agreement: *Miller v. Cannon Hill Estates, Limited*, [1931] 2 K.B. 113 at 120. The *Perry* case, *supra*, is distinguishable. This house was never completed in a workmanlike manner, and the making of the representations as to weeping-tile and waterproofing are important in determining whether the contract was executed. There must be implied here a warranty that the house would be completed in a workmanlike manner, and it was never so completed. *Redican v. Nesbitt et al.*, *supra*, is distinguishable, since there was no contractual obligation there, and the house was completed at the time of the contract.

The trial judge was entitled to give us our costs on the Supreme Court scale under s. 19(2) of The County Courts Act, R.S.O. 1937, c. 103. [ROBERTSON C.J.O.: How can s. 19(2) be applied to a counterclaim, when that is expressly dealt with in s. 20?] It has been the practice to apply the same rule to a counterclaim which is in excess of the jurisdiction as to an action, and that practice is sanctioned in *Martin Transports Ltd. v. Moir*, [1936] O.R. 99, [1936] 2 D.L.R. 104. [ROBERTSON C.J.O.: That seems to be legislation rather than interpretation. The Act is not capable of such an interpretation.]

*E. C. Bogart, K.C.*, in reply.

*Cur. adv. vult.*

25th March 1949. ROBERTSON C.J.O.:—This is an appeal by the plaintiff in the action from the judgment of His Honour Judge McDonagh, of the County Court of the County of York, at the trial of the action before him on the 23rd November 1948.

The appellant sued the respondent upon a cheque for \$500, given the appellant by the respondent as a deposit and part payment on the purchase of certain premises in the township of Etobicoke, on which the appellant was then erecting a house. The contract was subsequently completed so far as the purchase and sale of the property is concerned, but after paying the balance of the purchase price and receiving a conveyance of the property the respondent stopped payment of the \$500 cheque and resisted payment of the cheque in the plaintiff's action, alleging misrepresentation by the appellant as to the character of the work done upon the house, and breach of warranty by the appellant, and failure on the part of the appellant to complete the house in a workmanlike manner, as he had contracted to do. The respondent counterclaimed for the sum of \$750 damages, which by amendment at the trial, was increased to \$1,300.50.

The trial judge found for the respondent on the counterclaim, and, after setting off the amount of the cheque against the damages, he gave judgment for the respondent in the sum of \$800.50, with costs of action and counterclaim on the Supreme Court scale.

There is abundant evidence, in my opinion, to support the findings of the learned trial judge as to defects in the construction of the house when possession was given to the respondent, the existence of these defects not then being known to the respondent. Further, in my opinion, the sum of \$1,300.50 is a proper amount to be allowed the respondent for the expense incurred by him in making good these defects, and for damage sustained by reason thereof, in case he is entitled in law to recover the same.

On the argument of the appeal the ground mainly relied upon for the appellant was that the respondent had thoroughly inspected the house before making the agreement to buy it, and that afterwards the contract of purchase and sale was completed, the respondent paying the balance of the purchase price in full and accepting a conveyance and possession of the property, and that there being no finding of fraud and no claim to rescind the contract on the part of the respondent, that was an end of the matter. *Redican v. Nesbitt et al.*, [1924] S.C.R. 135, [1924] 1 D.L.R. 536, [1924] 1 W.W.R. 305, was cited.

When the respondent inspected the house before making an agreement to buy it, the building, according to the finding of the

trial judge, was 99 per cent. completed. The earth around and about the foundation had been filled in, so that there was really no way of examining the foundation, about which serious complaint is made. The respondent says that appellant represented to him, before the agreement of purchase was made, that the foundation was properly waterproofed and that weeping tiles were in place. The trial judge accepted the respondent's account of the conversation in which it is alleged that these and other representations were made. It is not, however, mainly upon oral representations made prior to the agreement of purchase and sale that the respondent relies, although they are not to be wholly disregarded. The signed contract, which was made in October 1947, is in the form of an offer by the respondent to purchase, with an acceptance in writing by the appellant. The offer is "to purchase all and singular the premises situate on the North side of Old Mill Terrace, in the Township of Etobicoke known as number 16 Old Mill Terrace". The offer was to be accepted by 11th October 1947, and the sale was to be completed on or before the 24th October 1947, on which date possession of the premises was to be given. The offer contains the following clause:

"The Vendor agrees that the house and grounds will be completed in a workmanlike manner and in particular the follow-work will be done: Same as No. 12 Old Mill Terrace."

No. 12 Old Mill Terrace is a house that had been built by the appellant and was occupied by him as his residence. The appellant was still working on the completion of the house he had agreed to sell to the respondent when the date for completion of the sale arrived. Several extensions were allowed him, and it was not until 12th November 1947 that a deed and possession of the property were given, and payment was made in the manner set out in the contract. The respondent moved into the premises on 14th November 1947.

Soon after going into possession the respondent found that there were serious defects in the foundation that permitted water in considerable quantities to flood the basement of the house, and he promptly stopped payment of the \$500 cheque. Other defects soon became evident. It may be said broadly that all these defects were due to bad workmanship, or the total omission



of work that should have been done. The counterclaim is made up of the loss and expense of the respondent in making good the various faults that were found to exist in the building.

It is quite plain that the case of *Redican v. Nesbitt et al.*, *supra*, does not apply to the facts of this case. There was not in question in that case a house in course of construction, nor was there any clause in the agreement of purchase as to the quality of the workmanship in the house that already had been erected. Of the numerous cases that were cited to us *Lawrence v. Cassel*, [1930] 2 K.B. 83, comes, perhaps, as near as any to the facts of this case. In that case the agreement of purchase contained the following clauses:

“(4) The vendor will complete the said dwelling-house in accordance with the plans of other B type houses on the estate and the house will contain sanitary fittings similar in all material particulars to the houses of this type already erected on the estate (as seen in Bentley Road).”

“(5) Before completion the vendor will execute the following work.” (The work related to painting the woodwork, providing certain electrical fittings and grates and mantel pieces.)

The Court held that the vendor had undertaken to do two things: (1) to complete the building; (2) to convey the property to the purchaser. The vendor had performed the second part of his agreement, but the first part, which was collateral thereto, he had not performed, and it was held that there was nothing in the conveyance, and its acceptance by the purchaser, to prevent him from enforcing performance of the collateral agreement. The present case is a stronger case for the purchaser than the case of *Lawrence v. Cassel*, *supra*, in this respect, that the agreement expressly provides that the house and grounds will be completed in a workmanlike manner. A term as to the manner of completion had to be implied in the case of *Lawrence v. Cassel*.

There is one point, however, arising in the present case that was not decided in the case of *Lawrence v. Cassel*. At p. 89 Lord Justice Scrutton said:

“I agree that it might require very careful consideration whether the agreement to complete the house referred exclusively to work to be done subsequently, accepting what had already been done as executed according to the contract, or whether it included

the whole of the work to be done on the house—that which purported to be completed as well as that which was plainly unfinished. There is a good deal to be said for the view that a contract to complete a house is not performed by making a house full of defects some of which subsequently appear in consequence of work badly done before the contract and some of which are due to bad work done after the contract. But on this question I say nothing, because no point was made at the trial that clause 4 of the contract only related to work which was to be done under clause 5, after the date of the contract and before completion of the sale, but did not apply to work done before the contract.”

The clause in the present agreement, it seems to me, should be read as providing, first, in general terms applying to what had already, to all appearances, been completed, as well as to what still remained to be done, and the house and grounds would be completed in a workmanlike manner; and secondly, that certain work that had not been done at all would be done the “Same as No. 12 Old Mill Terrace”. The latter part of the clause has reference only to some half dozen matters which the respondent refers to in his evidence as follows: “It was complete with the exception of the toilet and pedestal basin in the bathroom and toilet and basin in the basement; mastic tile floor was to be laid in the kitchen on top of plywood which was already there and mastic tile floor in the recreation room and the hall leading into that recreation room, and the hardwood floors had to be laid; other than that the house was finished.”

Instead of enumerating these things in the contract the parties agreed that these things were to be supplied, the same as in the house, no. 12, in which the appellant resided. In my opinion the words “The vendor agrees that the house and grounds will be completed in a workmanlike manner” are intended to express in the written contract the agreement made between the parties as to the character of the work in the whole building that, on completion, would be turned over to the respondent, in regard to certain parts of which representations had already been made by the appellant to the respondent. I would, therefore, hold that there was an express agreement contained in the contract of purchase by which the appellant undertook that the house and grounds would, both as to matters already done and as to matters

yet to be done, answer to the description that they were completed in a workmanlike manner. It seems to me that this is the proper interpretation to be placed upon this collateral agreement appearing in the contract of purchase.

If a narrower interpretation is given to the clause in question, and it is deemed to have reference only to work that still remained to be done, then there is nothing to exclude an implied warranty to substantially the same effect: *Miller v. Cannon Hill Estates, Limited*, [1931] 2 K.B. 113.

A question arises as to costs. The learned trial judge awarded costs to the respondent, and directed that he should have "one set of his costs of the action and counterclaim on the Supreme Court scale". There is certainly no warrant for giving the respondent costs of the plaintiff's action on the Supreme Court scale, or in fact for giving him costs of that action at all. With all respect to the judgment of this Court in *Martin Transports Ltd. v. Moir*, [1936] O.R. 99, [1936] 2 D.L.R. 104, where, by a majority, it was held that s. 19(2) of The County Courts Act, R.S.O. 1937, c. 103, applied to a counterclaim notwithstanding the provisions of s. 20 of the same Act, I am in agreement with the dissenting judgment of Mr. Justice Macdonnell in that case. It seems to me that it is no more possible to apply to a counterclaim the provisions of s. 19(2) than it would be to apply to a counterclaim any of the other provisions of that section. In the face of s. 20, it is plain that that cannot be done. I would, therefore, amend the order for costs by awarding neither party costs of the action, and by awarding costs of the counterclaim on the County Court scale to the respondent. The respondent should also have the costs of this appeal. Subject to the foregoing, the appeal should be dismissed.

ROACH J.A. agrees with ROBERTSON C.J.O.

HOPE J.A.:—This is an appeal from the judgment of His Honour Judge McDonagh, of the County Court of the County of York, dated the 23rd November 1948, after a trial without a jury.

The action was based on a cheque for \$500 dated the 11th October 1947, given by the defendant to the plaintiff as a deposit on the purchase of a dwelling house property pursuant to an offer to purchase signed by the plaintiff and the defendant on or



about the 11th October 1947, the payment of which cheque the defendant had stopped under circumstances hereinafter related.

The defendant in the action, by way of counterclaim, set up a claim for damages for breach of representations made and for failure to complete the said dwelling house in a workmanlike manner in accordance with the terms of the agreement.

In the statement of defence, the amount of the counterclaim was stated as being \$750. At the trial an amendment to the pleadings was granted, increasing the claim of \$750 to one of \$1,300.50.

At the trial the claim of the plaintiff for \$500 was allowed, and the claim of the defendant for \$1,300.50 was allowed. The judgment set the one off against the other, with the net result that a judgment was given for the defendant for the sum of \$800.50.

The trial judge found, and in my opinion his findings are amply supported by the evidence, that prior to the signing of the offer to purchase the plaintiff had represented to the defendant that the foundation of the dwelling house was waterproofed and that weeping tile had been laid around the foundations.

The offer to purchase contained the following clause: "The Vendor agrees that the house and grounds will be completed in a workmanlike manner and in particular the following work will be done: 'Same as No. 12 Old Mill Terrace.'"

The evidence disclosed that at the time of the execution of the offer to purchase, no. 12 Old Mill Terrace was completed and free from any water conditions, and that no. 16 Old Mill Terrace, the property being purchased, was incomplete. The evidence further disclosed that the offer to purchase provided for the closing of the transaction on the 24th October 1947, but that by reason of the failure of the plaintiff to complete the house, the date of closing was postponed from time to time, and that the transaction was finally closed on the 12th November 1947.

The evidence further disclosed that the plaintiff represented that the dwelling in question was completed in accordance with the terms of the agreement at the time of the closing of the transaction.

The defendant moved into possession of the premises on the 14th November 1947, and found, according to the reasons of the trial judge, well supported by the evidence, that the house had

not been completed in a workmanlike manner and that water conditions in the basement, which the plaintiff stated he had remedied prior to the closing of the transaction, again became apparent some ten days after the taking of possession and continued thereafter.

The evidence disclosed that after attempts were made to have the plaintiff vendor remedy the default, an examination of the premises was made and repairs completed by the defendant. The examination disclosed that the foundation of the house had not been waterproofed as represented and that weeping tile had not been properly placed around the foundation, and that the foundation itself was of faulty construction and material.

Counsel for the appellant argued that the sale was one of a completed house. However, I do not think that the evidence and the findings of the trial judge support the same. In my opinion the sale and purchase was of a house in the course of erection, and not a purchase of a completed house. Quite aside from the definite clause in the agreement hereinbefore cited, there would be, in the circumstances, an implied warranty. The law in this connection has recently been reviewed by the Court of Appeal in England in *Perry v. Sharon Development Co., Ltd.*, [1937] 4 All E.R. 390.

Counsel for the appellant argued that the judgment of Romer L.J. in that case gave support to his contention, and read an extract therefrom. However, a continued reading of this extract makes it quite evident that such is not the case. The extract in question and its continuation are as follows:

"It is well-established by numerous authorities . . . that, in the case of the sale of a completed house, there is to be implied on the part of the vendor no warranty as to the house being in any particular condition. The same rule would apply in the case of an uncompleted house, which is the subject-matter of a sale, where the structure stands at the time of the sale. Where, however, the contract is for the sale of a house when completed, there is an implied contract on the part of the vendor, in the absence of there being any express contract as to the way in which the house is to be completed, that the house shall be completed in such a way that it is fit for human habitation. In my opinion, in such a case as that, it matters not that the house has already been partly constructed. It was, indeed, argued by

Serjeant Sullivan that, in such case, although a contract in relation to work thereafter to be done might be implied, there could by implication be thrown on the vendor no obligation to do anything further to work which had already been done. I do not take that view."

In the case at bar there is a definite clause in the agreement which carries all the implications that the implied warranty would carry, and I am of the opinion that this warranty applied not only to the work to be completed after the date of the agreement of sale, but to work which had already been done in construction prior to the date of the agreement.

It was further argued that the trial judge was in error in awarding costs on the Supreme Court scale. This matter has already been dealt with by this Court in *Martin Transports Ltd. v. Moir*, [1936] O.R. 99, [1936] 2 D.L.R. 104. In the light of this judgment, I am of the opinion that whatever my personal view might be as to the award of costs the same was a matter for the discretion of the trial judge and that it should not be disturbed at this time.

The appeal will therefore be dismissed with costs.

*Appeal dismissed with costs subject to a variation as to costs of trial, HOPE J.A. dissenting as to the variation.*

*Solicitors for the plaintiff, appellant: Bogart & McMaster, Toronto.*

*Solicitors for the defendant, respondent: Day, Wilson, Kelly, Martin & Morden, Toronto.*



[McRUER C.J.H.C.]

**Bird v. The Town of Fort Frances.**

*Personal Property—Rights of Finder—Intentional Taking from Land of Another—No Claim by Landowner—Recovery from Subsequent Taker.*

Where one person enters upon the land of another and takes chattels to which the landowner asserts no legal rights, and is later wrongfully dispossessed of those chattels, he may bring an action to recover them, even if his original taking was wrongful. It is unnecessary in such circumstances to determine whether the original taking was also felonious, or was merely wrongful with no felonious intent. (Review of authorities).

The mere fact that the possession of the finder in such circumstances has been interrupted does not necessarily deprive him of the right to sue someone who wrongfully dispossesses him. To be entitled to sue for recovery of goods, the finder or wrongful taker must actually have taken possession, but when possession has once been acquired it is not necessary, to retain it, that the effective control should continue to be actively exercised. Possession is not lost so long as the power of resuming effective control remains.

AN ACTION to recover a sum of money. The plaintiff, an infant, sued by his mother as next friend.

28th September 1948. The action was tried by McRUER C.J.H.C. without a jury at Fort Frances.

*G. M. Burr*, for the plaintiff.

*T. H. Callahan*, for the defendant.

18th March 1949. McRUER C.J.H.C.:—This is an action brought to recover from the defendant the sum of \$1,430, the amount of a sum of money taken from the plaintiff by Chief Constable Gaston Louis Camerand, and subsequently handed over to the treasurer of the defendant municipality, and now held by him on deposit in a savings account in the local branch of the Dominion Bank.

In the month of May 1946 the plaintiff, who was at that time about twelve years of age, was playing with a number of other boys in the rear of a pool-room built on private property in the town of Fort Frances. As part of the game he attempted to crawl under the building and while doing so observed a can on a sill forming part of the understructure. On investigation he found this can to contain a large sum of money in bills. He took possession of it and after some incident in a coal bin, which was not clearly developed at the trial and is immaterial to this action, during which some of the money was lost, he took between \$1,400 and \$1,500 home, the substantial part of which he handed over to his mother, who hid it under the cushion of

a chair. Some days later, as a result of the plaintiff's generous spending, the chief constable questioned him. The plaintiff gave a true account of the facts and disclosed that he had \$60 on his person, and where the balance of the money was. The chief constable went to the plaintiff's home, without a search warrant, and asked Mrs. Bird for the money, which she handed over without objection. The chief constable said in evidence that his purpose in securing the money was to return it to the rightful owner if he should be found. He says that he kept it for some time and, finding no owner, turned it over to the town treasurer. The town treasurer says that when he received the package of money from the chief constable the latter told him that it was money found and asked him to keep it in safe-keeping. It was eventually deposited, on the 23rd December 1946, in a special savings account to the credit of the Town of Fort Frances marked "Funds for Court disposal". The balance shown in the account on the 27th September 1948 was \$1,460.61.

The defendant in its statement of defence alleges that the moneys were found on premises owned by the late John Sandul and were rightfully retained by it as trustee for the true owner. Para. 2 reads as follows:

"The Defendant submits that it has retained these moneys in good faith as trustee for the true owner and asks the direction of the Court with respect to the disbursement thereof, bearing in mind that the executor of the estate of the late John Sandul has already made a demand upon the Defendant for the return of the monies to him."

There was no evidence given at the trial of any demand made by the executor of the estate of the late John Sandul, and my understanding of what counsel said is that no such claim is made to the money. During the course of the trial counsel said that the executor wished to make a statement to the Court. I intimated that unless the executor was making a claim to the money, and would formally do so at the consequent risk of costs, I would not hear him. With that the matter was dropped. Whatever the rights of the estate of John Sandul may be, they cannot be considered or disposed of in this action as framed.

The facts are simple, but the law applicable has been a subject of absorbing interest to legal philosophers, jurists and text-

book writers throughout the evolution of our jurisprudence, and in some respects the British law cannot yet be said to be settled.

It is convenient first to consider the case in the following aspects: the rights of the plaintiff as the finder of the money; whether the removal of the money from the property of another was a felonious act; if so, how far his right to recover against this defendant is affected thereby; and whether the plaintiff's possession was subsisting at the time the money was handed over to the chief constable, or had been so interrupted as to deprive him of a right to maintain this action.

The plaintiff's right of action, if any, depends on a finding that he was wrongfully deprived of possession of the money by the chief constable, and that the defendant continues to interfere wrongfully with his possession. I know of no better preface to a consideration of the law applicable than the chapter on "Possession" in Holmes's Common Law, 1881, from which I adopt the language of the learned author at p. 239 to express a cardinal principle of great antiquity:

"The facts constituting possession generate rights as truly as do the facts which constitute ownership, although the rights of a mere possessor are less extensive than those of an owner."

Since *Armory v. Delamirie* (1722), 1 Stra. 505, 93 E.R. 664, by the law of England the finder of a chattel, though he does not acquire absolute property or ownership, yet has such property as will enable him to keep it against all but the rightful owner (or at least one superior in title), and consequently may maintain trover. In that case a chimney-sweep found a jewel and carried it to the defendant's shop to know what it was. One of the defendant's employees, after a pretence of weighing it, refused to return the stone. Judgment was given in favour of the plaintiff.

Where the contest is between the finder and the owner of the premises on which a chattel is found the law still remains in an unsettled state, and I refer to it only as far as it throws some indirect light on the subject I have to consider, and not for the purpose of entering the lists of the legal debate that still continues on this subject.

In *Bridges v. Hawkesworth* (1851), 21 L.J.Q.B. 75, the plaintiff found a parcel of bank-notes which had dropped on the



floor in the part of a shop frequented by customers. He handed them to the shopkeeper to hold pending inquiry by the true owner. The true owner was not found and the plaintiff sued the shopkeeper to recover the notes. Judgment was given in his favour.

This case, together with all other relevant cases on the subject, has been the subject of consideration in two recent judgments in the English courts. In *Hannah v. Peel*, [1945] K.B. 509, [1945] 2 All E.R. 288, the defendant was the owner of a house which he himself had never occupied. While the house was under requisition for war purposes the plaintiff, a soldier, found in a bedroom used as a sick bay, loose in a crevice on top of a window frame, a brooch, the owner of which was unknown. There was no evidence that the defendant had any knowledge of the existence of the brooch before it was found, but the police, to whom the plaintiff handed it for the purpose of ascertaining its owner, delivered it to the defendant, who claimed it as being found on the premises of which he was the owner. After a full discussion of the somewhat conflicting authorities, including *Elwes v. Brigg Gas Company* (1886), 33 Ch. D. 562, and *South Staffordshire Water Company v. Sharman*, [1896] 2 Q.B. 44, Birkett J. followed the decision in *Bridges v. Hawkesworth* and gave judgment for the plaintiff.

In *Hibbert v. McKiernan*, [1948] 2 K.B. 142, [1948] 1 All E.R. 860, Lord Goddard C.J. was required to consider the subject in a different aspect. McKiernan had been charged with the theft of eight golf balls, which had been lost and abandoned by their original owners and picked up and carried away by him while trespassing on the course. The justices found that the balls had been abandoned by their original owners and only one was capable of being identified. They were of the opinion that the appellant took the balls for the purpose of selling them and that by taking the balls the appellant meant to steal them and did steal them, but stated a case on the questions of law which they considered arose, in the main whether the appellant, by finding them, acquired title to the balls, which, as they had been abandoned by their original owners, would prevail against the owners of the land on which they were found.

After referring to *Bridges v. Hawkesworth*, *Elwes v. Brigg Gas Company* and *South Staffordshire Water Company v. Sharman*, the Lord Chief Justice said: "These cases . . . have long been the delight of professors and text writers, whose task it often is to attempt to reconcile the irreconcilable". He pointed out that "the Corpus Professor of Jurisprudence at Oxford and the Professor Emeritus of English Law at Cambridge have expressed the opinion that *Bridges v. Hawkesworth* was wrongly decided". He referred to the decision of Birkett J. in *Hannah v. Peel* as having reinvigorated that "much-battered case" and left it to wiser heads than his to end the controversy "which will no doubt continue to form an appropriate subject for moots till the House of Lords lays it to rest for all time".

This discussion bears only on the case I have to decide in considering whether the plaintiff was a "true finder" as the term is used in the cases, or whether the owner of the land on which the money was found had an interest in it; and if he had whether the plaintiff was a mere wrongful taker or in law guilty of a felonious act. If the taking in this case amounted to a felony then for the first time in British law, as far as I can determine, the question must be expressly decided whether a thief can maintain an action for trover or conversion against one who has wrongfully deprived him of possession of the thing stolen. If the taking was "wrongful taking" with no felonious intent, the course to be followed is much more clearly defined.

I quote again from Holmes, *op. cit.*, at p. 241: "The consequences attached to possession are substantially those attached to ownership, subject to the question of the continuance of possessory rights. . . . Even a wrongful possessor of a chattel may have full damages for its conversion by a stranger to the title, or a return of the specific thing."

The earliest reference to the subject that I have been able to find in the English law is in Brooke's Abridgment, 1586, *s.v.* "Trespas," pl. 433, where he cites Y.B. 13 Henry VII, 10, for the statement that a wrongful taker has title against all but the true owner. (An examination of the Year Book does not appear to verify the accuracy of this citation.) While it is stated in *Armory v. Delamirie*, *supra*, that the finder has "such a property as will enable him to keep it against all but the rightful owner.

and consequently may maintain trover", that case does not discuss the relevancy of the circumstances under which the "lost article" was "found", as was done in *Hibbert v. McKiernan*, *supra*,

Goodeve on Personal Property, 8th ed., 1937, at pp. 38-9, states: "... the possessor need not have the further qualification of a title to possess. The facts of exclusive and exclusory control may be as true of a finder, borrower, pawnbroker, an honest non-owner who believes he is the owner, a trespasser, or *even a thief*, as they are of a true owner." (The italics are mine.)

The only authority relied on for this statement, which is broader than I have been able to find in any other text-book, is *Buckley v. Gross et al.* (1863), 3 B. & S. 566, 122 E.R. 213. I am not at all sure the judgments in that case warrant the unqualified inclusion of the words "even a thief" in the statement, and certainly this aspect of the law was not the crux of the decision. The action was brought for damages for conversion of a quantity of tallow which had been recovered from the River Thames and the sewers of London after a fire among certain warehouses and sold to the plaintiff. The tallow was taken from him by a police officer who found him carrying it through the streets of London at night. He was charged with having it in his possession knowing it to have been stolen. The charge was dismissed, but an order was made under 2 and 3 Vict. c. 71, s. 29, that the tallow be delivered and sold under direction of the commissioner of police of the metropolis. The defendants purchased it at the sale. Cockburn C.J. stated that it was not necessary "to decide whether a person who has possession of a chattel without title may, if the possession be taken from him by a wrong doer, maintain an action against the wrong doer and persons deriving title from him otherwise than in market overt". The learned Chief Justice went on to hold that the answer to the plaintiff's case was that the defendant did not derive a title through a wrongdoer but under the provisions of the statute which authorized the sale. At p. 572 he said: "The plaintiff, who had nothing but bare naked possession (which would have been sufficient against a wrong doer) had it taken out of him by virtue of this enactment."



Crompton J. stated, at p. 573: "It is clearly established that possession alone is sufficient to maintain trover or trespass against a wrong doer who takes property from a person having possession of it. It is not clear, however, that the plaintiff, or the person from whom he purchased this tallow, was a finder of it within the principle of *Armory v. Delamirie* and other cases. I think, on the evidence and the inferences to be fairly drawn from it, that he is more in the position of a person who has unlawfully or feloniously, perhaps the latter, obtained possession of it, whereas I look on the term finder in those cases to mean an *innocent* finder."

The learned judge agreed with the learned Chief Justice that where the possession is unlawfully divested out of a man and the property is ultimately converted by a person who does not claim through an original wrongdoer, the person whose possession was so divested had no property at the time of the conversion. At p. 574 he states: "I consider that it was the duty of the constable to take the tallow and the plaintiff into the custody of the law, and that even without reference to stat. 2 & 3 Vict. c. 71. The defendants here do not claim under the constable, and, supposing they did, the constable did nothing wrong."

No light is thrown in this judgment on what would have been the result if it had not been for the provisions of the statute, and the plaintiff had been in the position of asserting his felonious possession against a wrongdoer.

Blackburn J. at p. 574 states: "I do not wish to question the doctrine laid down in several cases, that possession of personal property is sufficient title against a wrong doer; nor that it is no answer to the plaintiff in such a case to say that there is a third person who could lawfully take the chattel from him; and I do not know that it makes any difference whether the goods had been feloniously taken or not." The learned justice, on the assumption of that being a correct statement of the law, holds that the plaintiff has not brought himself within it. He holds that the mere fact that the tallow in question was mixed with other tallow and that the respective owners of the mass could not be ascertained did not mean that the property, the ownership of which was known as this was, belonged to the person who picked it up. He goes on to state that where the

property was being carried through the streets of the metropolis at an early hour of the morning by a person who had no right to receive it at common law, the constable was justified in taking it into his possession and bringing it before a justice of the peace and upon the justice drawing the inference that the tallow had come from burning warehouses, as a matter of law the police were bound to hold it for the true owner, because they had ascertained that there was a true owner and who he was. Their possession was the possession of the true owner and not that of the wrongdoer, whose possession was terminated by their taking possession.

In Pollock and Wright on Possession, 1888, at p. 187, it is stated: "If a finder has reason to believe that the thing is abandoned by its owner, then, whether or not it is so abandoned and whether or not a civil trespass is committed, there can be no theft at the first because there does not exist the belief the appropriation will be *invito domino* which is essential for *animus furandi*. And a subsequent appropriation, even after discovery that the owner had no intention of abandonment, would seem to be within the principle of the immunity accorded by the modern decisions to the pure finder.

"A taker upon a loss and finding may, like any other possessor, maintain trespass and theft and trover or detinue against a stranger."

Scrutton L.J. in *Daniel v. Rogers*, [1918] 2 K.B. 228 at 234 states: "Since the case of *Armory v. Delamirie* it has been well established that mere possession is enough to entitle a person to sue in trover, and that he need not show the manner in which possession was obtained."

Reference may also be made to the judgment of Kenyon C.J. in *Graham v. Peat* (1801), 1 East 244 at 246, 102 E.R. 95, and to *Jeffries v. The Great Western Railway Company* (1856), 25 L.J.Q.B. 107 referred to in Pollock and Wright, *op. cit.*, at pp. 91 *et seq.*

In Williams on Personal Property, 18th ed. 1926, pp. 51-2, the law is stated as follows: "The finder or wrongful taker of another's goods, has the right to maintain or recover possession of them as against all the world, except the owner. Should he be dispossessed by any stranger, he will be entitled to use any

of the owner's remedies for the recovery of the goods or their value. And the stranger will not be enabled to set up the owner's right (*jus tertii*) as a defence to the action, unless he show that he acted with the owner's authority."

This statement of the law was re-affirmed in *Eastern Construction Company, Limited v. National Trust Company, Limited et al.*; *Eastern Construction Company, Limited v. Schmidt et al.*, [1914] A.C. 197 at 209-10, 15 D.L.R. 755, 25 O.W.R. 756, and in *Glenwood Lumber Company, Limited v. Phillips*, [1904] A.C. 405 at 410.

In applying the law I have discussed to the facts of the case before me I am convinced that the plaintiff was not a "true finder" within the meaning of the term as used by jurists and writers. The money was not found in a public highway or public conveyance or in any place to which the public had access by leave or licence, nor was there anything to lead one to believe that it had been lost in the true sense. It had been carefully put in the container for the purpose of hiding it in the place in which it was discovered. It may well be that it was hidden by a thief, or it may be that it was abandoned, but it was not lost in the sense that a wallet is lost if dropped in the street or that the bank-notes in *Bridges v. Hawkesworth*, *supra*, or the jewel in *Armory v. Delamirie*, *supra*, or the brooch in *Hannah v. Peel*, *supra*, were lost. The person who put the money where it was found put it there deliberately.

The plaintiff had no right to remove it from the property of another, and undoubtedly was a wrongful taker. The more difficult question to decide is whether he had a felonious intent and the taking was felonious; and if so, whether he would have the same rights as a wrongful taker who took under such circumstances that it did not amount to a felony. The case is to be distinguished from *Bridges v. Hawkesworth* and *Hannah v. Peel* on the ground that in both those cases the plaintiff made immediate disclosure, on the one hand to the shopkeeper, and on the other hand to the police, which disproved any *animus furandi*, while in the present case every effort was made to conceal the fact that the plaintiff had taken possession of the money and removed it from the place where it was found.



A very comprehensive discussion of the law both ancient and modern on this aspect of the case is to be found in Pollock and Wright, *op. cit.*, pp. 171-187. The conclusion I have come to is that it is not necessary for me to decide whether the taking was with felonious intent or not, as I think in this case the same result flows. In my view the authorities with which I have dealt justify the conclusion that where A enters upon the land of B and takes possession of and removes chattels to which B asserts no legal rights, and A is wrongfully dispossessed of those chattels, he may bring an action to recover the same.

The next question to consider is whether the plaintiff had parted with possession of the money to his mother under such circumstances as deprive him of the right of action. The mere fact that the plaintiff's possession may have been interrupted does not necessarily deprive him of the right to maintain an action against someone who wrongfully dispossesses his successor in possession. While it is not an authoritative statement of the law, I adopt the reasoning in Holmes, *op. cit.*, at pp. 236-7:

"But it no more follows, from the single circumstance that certain facts must concur in order to create the rights incident to possession, that they must continue in order to keep those rights alive, than it does, from the necessity of a consideration and a promise to create a right *ex contractu*, that the consideration and promise must continue moving between the parties until the moment of performance. When certain facts have once been made manifest which confer a right, there is no general ground on which the law need hold the right at an end except the manifestation of some fact inconsistent with its continuance, although the reasons for conferring the particular right may have great weight in determining what facts shall be deemed to be so. Cessation of the original physical relations to the object might be treated as such a fact; but it never has been, unless in times of more ungoverned violence than the present. . . . Accordingly, it has been expressly decided, where a man found logs afloat and moored them, but they again broke loose and floated away, and were found by another, that the first finder retained the rights which sprung from his having taken possession, and that he could maintain trover against the second finder, who refused to give them up."

In order to sue for recovery of goods, the finder or wrongful taker must actually have taken possession, but when possession is once acquired it is not necessary, in order to retain it, that the effective control which must be used to gain possession originally should continue to be actively exercised. Possession will not be lost so long as the power of resuming effective control remains: Williams, *op. cit.*, p. 53. Any difficulty that might arise out of the contention that the plaintiff had voluntarily parted with possession of the money to his mother could be overcome by adding Mrs. Bird as a party in her personal capacity. This contention was not set up in the pleadings and I think it may be dismissed from further consideration.

There remains the question whether the police took possession of the money by due process of law and it is now held in trust for the owner, making applicable the common law as laid down in *Buckley v. Gross et al.*, *supra*. In that case the police officer arrested the accused in the street at night and took the tallow from him. *Lawrence v. Hedger* (1810), 3 Taunt. 14, 128 E.R. 6, referred to in the judgment of Blackburn J., only extends to the power of a police officer to arrest a person found in the streets at night whom there is reasonable ground to suspect of a felony.

At common law where a search warrant for the recovery of goods has been issued the goods, being found, ought not to be delivered to the party complaining, but should "remain in the constable's hand till either by a writ of restitution upon the conviction of the felony, or by due order of the court they be delivered": 2 Hale's Pleas of the Crown, p. 114.

I can find no authority for the police officer taking possession of the money as he did in this case as of right. That being so, the proper construction to be put on the transaction between him and the plaintiff's mother is that the police officer, believing that the true owner could be found, requested that the money be handed over to him to be held by him as the bailee of the plaintiff pending the search for the true owner. When he was unable to ascertain who the true owner was, in the absence of any other claim, he ought to have returned the money to the custody from which it came. The defendant can have no higher right than the police officer would have had, had he not handed the money over to the defendant and it is therefore liable for the amount of the money at the suit of the plaintiff.

Even, in the circumstances, if the money had been seized under a search warrant the constable would have been obliged to return it to the custody from which it was taken upon there being no conviction and no true owner found.

There will be judgment for the plaintiff for \$1,430, together with the interest accrued in the bank account. The money will be paid into court to the credit of the infant and paid out when he reaches the age of 21 years. Costs will follow the event.

*Judgment accordingly.*

*Solicitor for the plaintiff: G. Moffat Burr, Fort Frances.*

*Solicitor for the defendant: T. H. Callahan, Fort Frances.*

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[CHEVRIER J.]

**R. I. Crain Limited v. Ashton and Ashton Press Manufacturing Company Limited.**

*Master and Servant—Trade Secrets—Restraining Employee, after Termination of Employment, from Making Use of Trade Secrets Learned during Employment—What are Trade Secrets—Preservation of Secrecy—Possibility of Honest Discovery by Incorporation of Secret in Machine Sold.*

A trade secret must be known only to its owner and those of his employees to whom it is necessary to confide it, and it differs from a patent right in that so soon as the secret is discovered, either by an examination of the product or in any other honest way, the discoverer has a full right to use it. Accordingly, where it is sought to restrain a former employee from making use of trade secrets learned during the course of employment, the onus is on the plaintiff to show not only that the processes in question were secret when they were first used by the plaintiff, but that they remained secret, and had not become known to others, at the time when the defendant used them in the service of others, or on his own account. It is well-settled law that no employee is entitled to take his employer's secrets, but on the other hand no employer is entitled to prevent his employee from making use, in the service of others or on his own account, of any experience or skill gained during his employment.

AN ACTION to restrain the disclosure of trade secrets.

6th to 9th December 1948. The action was tried by CHEVRIER J. without a jury at Ottawa.

*J. D. Watt, K.C., and R. C. Merriam, for the plaintiff.*

*J. Sedgwick, K.C., and C. F. Scott, for the defendants.*



21st March 1949. CHEVRIER J.:—Both companies hold Dominion charters. The defendant Ashton is the president and principal shareholder of the defendant company.

The defendant Ashton was employed by the plaintiff company as machine-shop foreman, and later as mechanical superintendent. It is alleged that during the time he held the said position he became familiar with many trade secrets and other confidential information of the plaintiff company. In October 1946 he left the employ of the plaintiff company, allegedly pursuant to certain arrangements and undertakings, and shortly thereafter incorporated his own company, the defendant company. The plaintiff says that on or about the 7th January 1948 it became aware that the defendants were soliciting orders from competitors of the plaintiff company, for machines and products which, it says, embodied secret processes and developments belonging to the plaintiff, and acquired by the defendant Ashton whilst employed in a position of trust and responsibility by the plaintiff.

The plaintiff alleges that it had repeatedly urged the defendants to desist from such doings, but that he (Ashton) has failed to do so. The plaintiff says that on the 8th September 1948 it learned that a machine, said to embody secret processes and developments belonging to the plaintiff company, and acquired by Ashton as aforesaid, had been manufactured by the defendants and was ready for shipment.

The plaintiff claims an injunction restraining the defendants from disclosing the trade secrets of the plaintiff company, by selling machines, or soliciting orders for machines, similar to those used by the plaintiff company, and embodying the secret processes and advancements developed by the plaintiff company.

In answer to a demand for particulars the plaintiff submitted a long list of the alleged secrets with which Ashton became familiar, which, for the better understanding of the facts, it becomes necessary to set out, though in more concise form, and which are as follows:

(a) "The way or ways the component parts of continuous form presses were assembled"; (b) "the method of controlling the paper as it passes through the machine"; (c) "the register of the different printing units with each other"; (d) "the number-

ing, perforating, punching and slitting of the paper as it feeds through the machine"; (e) "the mounting of the printing plates"; (f) "the handling of the forms after they leave the press"; (g) "the method of 'throwing off' the numbering machines"; (h) "the method of holding marginal punch dies and punches"; (i) "the arrangement of one press unit to another"; (j) "the method of clamping perforator blades"; and (k) "the method of re-winding." The plaintiff then sets out the numerous ways in which the defendant Ashton also became familiar with the said secrets and confidential information, through conversations with the works manager of the plaintiff, through discussions in the meetings of the board of directors, etc., through the minutes of the meetings, from drawings and blue-prints owned by the plaintiff company. It also says that Ashton, during December 1947 and January 1948, solicited orders for continuous form presses from Business Systems Limited and other such concerns.

By way of defence, Ashton says that during his term of employment with the plaintiff company he did not become familiar with any trade secrets or other confidential information; that there were not, in fact, any trade secrets in the ways, methods and processes, as alleged by the plaintiff, but that all such ways, methods and processes were common knowledge in the trade. He further says that there were no secret processes or developments embodied in the machine, and productions, for which orders were solicited from Business Systems Limited and others. He also says that in September 1948 they had ready for shipment a machine which did not embody any secret processes or developments belonging to the plaintiff company, and acquired by Ashton whilst in the employ of the plaintiff. Finally, the defendants say that if any of the ways, methods and processes referred to by the plaintiff do constitute trade secrets, or secret processes and developments, then certain alleged arrangements, understandings and agreements made between the parties (which will be dealt with later) operate as a release of the defendants, by the plaintiff, from any obligation not to divulge such trade secrets.

First, dealing with the law, which is well settled in matters of this kind.

In *Triplex Safety Glass Company v. Scorah*, [1938] Ch. 211, [1937] 4 All E.R. 693, it is laid down, as stated in the headnote, that: "Where an employee makes an invention or discovery in the course of his employment, . . . there is an implied term . . . that such invention or discovery becomes the property of his employers, . . . where the employee has made an invention or discovery in the course of his work, the employee becomes a trustee of that discovery or invention for his employers, and he remains such a trustee after he has left their employment." At p. 215 Farwell J. said: " . . . no employee is entitled to filch his employer's property in whatsoever form that property may be, whether it is in the form of a secret process or in some other form. On the other hand, no employer is entitled to prevent his employee from making use, in the service of any persons or on his own account, of any experience or skill which the employee has gained during his term of service with the employer . . . any contract which attempts to prevent him making use of such skill or knowledge is not enforceable."

In *Saltman Engineering Coy. Ltd. et al. v. Campbell Engineering Coy. Ltd.* (1948), 65 R.P.C. 203, the Master of the Rolls, Lord Greene, at pp. 211, 213, says: "If two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it some confidential matter, even though the contract is silent on the matter of confidence the law will imply an obligation to treat that confidential matter in a confidential way. . . . The defendants knew that those drawings had been placed in their possession for a limited purpose . . ."

And in *British United Shoe Machinery Company Ltd. v. Fussell & Sons Ltd.* (1908), 25 R.P.C. 631 at 657, it is said by Buckley L.J.: "For this purpose, a combination, I think, means not every collocation of parts, but a collocation of inter-communicating parts so as to arrive at a desired result . . ."

In *Amber Size and Chemical Company Ltd. v. Menzel* (1913), 30 R.P.C. 433, it was held that the Court would restrain an ex-servant from publishing or divulging that which had been communicated to him in confidence.

The law again is very tersely expressed thus in *Herbert Morris, Limited v. Saxelby*, [1916] 1 A.C. 688 at 702 by Lord Atkinson:



"He [the master] is undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which may be of vast value. And that protection may be secured by restraining the employee from divulging these secrets or putting them to his own use."

At p. 704 Lord Atkinson, quoting Farwell L.J. in *Sir W. C. Leng & Co., Limited v. Andrews*, [1909] 1 Ch. 763 at 773, says:

"[The] doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which a man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to anyone else—matters which depend to some extent on good faith."

Lord Shaw of Dunfermline says at p. 714:

"Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge — these may not be given away by a servant; they are his master's property and there is no rule of public interest which prevents a transfer of them against the master's will, being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability — all those things which in sound philosophical language are not objective, but subjective — they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property, they are himself."

In Diamond, *The Law of Master and Servant*, 2nd ed. 1946, p. 105, art. 48, it is said: "It is the servant's duty not to use for his own purposes or disclose to other persons, whether during or after the employment, confidential information received by him in the course of his employment. Such confidential information includes trade secrets, whether written or unwritten, . . ."

In *Louis v. Smellie* (1895), 11 T.L.R. 515, it was the use of materials that was enjoined.

In *Waite's Auto Transfer Limited v. Waite*, [1928] 3 W.W.R. 649, the claim was for an injunction to restrain Waite, a former

director of the plaintiff company, from canvassing customers of the company with whom he had become acquainted during such employment. The injunction was refused because he had not taken away any written lists or other material. All he used was the information he kept in his head.

In *Ice Delivery Company Limited v. Peers and Campbell*, 36 B.C.R. 445, [1926] 1 W.W.R. 595, [1926] 1 D.L.R. 1176, the Court of Appeal of British Columbia held, as stated in the D.L.R. headnote, that "An injunction will not be granted to restrain a former servant from soliciting his master's customers where the servant has made no list of such customers, but retains their names in his memory".

The claim here is that the combination of the various trade secrets, with the other features, in their peculiar relationship, constitute or make up this continuous form press; and that this peculiar relationship of special and other parts, is a matter of vital importance as to the production, speed, accuracy and tolerance of the machine.

#### *What are Trade Secrets?*

Counsel have given me no definition, nor have they made any attempt to define a trade secret. The only place where I have been able to find a definition is in vol. 42 of "Words and Phrases" perm. ed. 1940, pp. 207-8, s.v. "Trade Secrets". Those definitions are taken from decided American cases. Relying upon the words of Ritchie C.J. in *Sherren v. Pearson* (1887), 14 S.C.R. 581 at 587, as to the value of American decisions, I accept those definitions.

1st. "A trade secret . . . is a property right, and differs from a patent in that as soon as the secret is discovered, either by an examination of the product or any other honest way, the discoverer has the full right of using it. . . . *Progress Laundry Co. v. Hamilton*, 270 S.W. 834, 835, 208 Ky. 348."

2nd. "A trade secret is a plan or process, tool mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. *Cameron Mach. Co. v. Samuel M. Longdon Co.*, N.J. 115 A. 212, 214; *Victor Chemical Works v. Iliff*, 132 N.E. 806, 811, 299 Ill. 532."

3rd. "The term 'trade secret', as usually understood, means a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade

having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on. *Glucol Mfg. Co. v. Shulist*, 214 N.W. 152, 153, 239 Mich. 70."

4th. "A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is a process or device for continuous use in the operation of the business. The subject matter of a trade secret must be secret. Restatement, Torts, §757."

A trade secret differs from a patent right in that as soon as the secret is discovered, either by an examination of the product, or in any other honest way, the discoverer has the full right of using it: no. 1, *supra*. It is obvious that, by only looking at a liquid compound, it might be very difficult to determine its component elements and the formula by which they were compounded or mixed. Can the same be said of rollers, punches, shafts, etc., which, though they may be made to work in a special way and under a certain interdependency as between themselves, are not encased or hidden from view, but on the contrary are placed in their proper position in the mechanism, open to view and in no wise held in secrecy?

And again it must be "known only to its owner and those of his employees to whom it is necessary to confide it": no. 2, *supra*. The onus is therefore on the owner to establish that such secret was known only to him and those of his employees to whom it was necessary to confide it. That, in my opinion is confirmed by the following words of Lord Parker of Waddington in *Herbert Morris, Limited v. Saxelby*, *supra*: "I will assume that the matters referred to by Mr. Walter are in fact peculiar to the plaintiffs' business, though I can hardly regard Mr. Morris's uncorroborated evidence as very satisfactory that the practices in question were unknown to other firms."

#### *The Alleged Trade Secrets.*

On the argument in reply to the motion for non-suit, counsel for the plaintiff did not go over all of the features claimed in evidence in chief to be trade secrets (nor perhaps was it necessary to do so); but limited himself to referring to a few only, submitting that if he could establish that the machine manu-



factured by the defendants contained one or more of such trade secrets, that was sufficient to establish his case.

The onus was on the plaintiff to establish the existence of such trade secrets, at least to establish a *prima facie* case. The evidence as to the existence and nature of the features said to be trade secrets was given by Harold Crain. No other evidence was given to substantiate or confirm that such alleged trade secrets were unknown to others. The defence adduced no evidence, relying solely on cross-examination of Crain, and basing thereon a motion for non-suit.

This mode of attack and of defence does not make it easier to make findings of fact on the large number of features which are submitted as "trade secrets" by the plaintiffs, and denied by the defendants. Rather, that paucity of evidence on both sides makes it most difficult: the onus is on the plaintiff to convince me that what it alleges to be trade secrets are in fact such.

In a general way Harold Crain testified as follows, to uphold the claim that their various features were in fact trade secrets: It may very well be that all, some, or none of those features could or could not be the subject matter of a patent. But that is beside the point. Were they conceived, used, improved, in secrecy during the years the plaintiff was engaged in the manufacture of presses for printing these continuous forms, and were they unknown to others? The witness Crain's evidence establishes that the nature of many parts was guarded, especially in his father's time, and even the defendant Ashton, in his discovery, admits it. But once they were embodied in the machine, and the machine was sold, did they continue to exist as secrets?

First, as to the nature of Ashton's employment. This is taken from his examination for discovery. Before being engaged by the plaintiffs he had never built any press (q. 77), nor had he ever seen a continuous form press (q. 78); each press built was an improvement over the last one (q. 85); the changes made came out of his head (q. 88); the plaintiff suggested certain improvements from time to time, they were talked over with the officers (qq. 97, 99, 100, 102); during all that time any improvements he made were suggested to him by his fellow-employees or officers of the company; during all the time of his employment he disclosed nothing, because he was an employee in a position of trust and responsibility, though he says that these features were

known to others "because practically the whole machine is standard, is common knowledge".

I am not prepared to hold that the secrecy maintained in the plaintiff's plan was lost by interviews, reports or consultation with Standard Register Company, because Ashton admits (q. 113), that he would not have had access to the information there had he not been an officer of the plaintiff company, and that that information was zealously guarded (qq. 114 to 123).

I must find that many of the features in question herein were created in secrecy in the plaintiff's plant, but that secrecy must amount to more than "mere privacy with which an ordinary commercial business is carried on": *Glucol Mfg. Co. v. Shulist*, *supra*.

I am also prepared to accept that a number of the features mentioned in the plaintiff's evidence were originally trade secrets. But there is no evidence that they remained so (*infra*).

It is in evidence (Ashton's discovery, q. 79) that seven presses were manufactured by the plaintiff during Ashton's term of employment with it; that changes were made in the original model when it came to the construction of the second and third presses. It is therefore safe and proper to conclude that the trade secrets, or at least some of them, conceived in the secrecy of the plant, formed part of the mechanism of such presses as found their way on to the market. There is no evidence that to this day they have remained undiscovered, or that they are still unknown to others. From then on, all secret features forming part of such presses were on the open market, subject to the examination and understanding of anyone who desired to explore their nature.

"The subject matter of a trade secret must be secret": Re-statement of the Law of Torts, *ubi supra*; ". . . as soon as the secret is discovered, either by an examination of the product, or any other honest way, the discoverer has the full right to use it": *Progress Laundry v. Hamilton*, *supra*.

A glance at ex. 1 will show that that machine is a huge piece of complicated machinery. It is said that the machine made by the defendant is similar. Be that as it may, for the moment: it is safe to say that the defendant's machine is also a huge piece of complicated machinery. There is no direct evidence, and again it is deplorable, as to the amount and nature of the drawings the

plaintiff furnished to the defendant Ashton to enable him to set up his machine. Ashton admits having been supplied with drawings and jigs and dies by the plaintiff: (his examination for discovery, q. 196); that he had to have those drawings to manufacture the press (q. 198); that he returned them all (q. 201); that he made copies of them (q. 202); and that he has retained them (q. 203). When asked if that would be some 200 or 250, he answered that he had not the slightest idea.

No doubt Ashton, who is an experienced mechanic, carried in his mind the general features and probably many details about the construction of this press. But it would be a physical impossibility to construct such a complicated piece of machinery without drawings, and Ashton has admitted that he obtained the drawings from the plaintiff. So that he did not construct this press exclusively from information or knowledge carried in his head or memory.

In *Herbert Morris, Limited v. Saxelby*, *supra*, Lord Parker of Waddington says at p. 712: “. . . these documents were far too detailed for the defendant to carry away the contents thereof in his head. All that he could carry away was the general method and character of the scheme of organization practised by the plaintiff company. Such scheme and method can hardly be regarded as a trade secret.”

But on the evidence adduced I am unable to find whether what he did include in the set-up, were or were not *at such time* still trade secrets, if they ever had been.

If the features involved in or disclosed by the plans and drawings in question were already part of one or more of the presses already made by the plaintiff and sold, and I must assume they were, then such features were no longer trade secrets, unless there was evidence, and there is not, that they were still “unknown to others”.

I have long and carefully considered each of the thirty and more features alleged by the plaintiff to be in the nature of trade secrets. I have viewed each one in the light of the definitions I have accepted. None of them is, nor are they set up to be, the result of chemical or mechanical compounds; all are concrete features susceptible of eye-and-touch examination and of understanding by anyone skilled in mechanics. I find that all or most of them were conceived in the privacy of the plaintiff's establishment, some as the result of much thinking and experi-



menting by skilled and trusted employees, and by the members of the plaintiff's board; that their nature and the manner of their setting-up was zealously guarded by all. But none of them was patented; their sole protection would lie in their nature of trade secrets, if they can be brought within that description. They have been embodied in presses which have been sold; they are now available to the examination of anyone who may be sufficiently skilled to understand them. Having been exposed to the light of the open market, I must, as I do, find that in whatever shroud of secrecy they may have been held during their making, there is no evidence that that state has been preserved. Moreover, the evidence does not satisfy me that any one of them is "unknown" to others.

It is perhaps idle to repeat that Ashton can be enjoined from making use now of any trade secrets with which he had become familiar in his long term of employment with the plaintiff. I can easily find, and do find, that when the following features were embodied into the first press they were at such time trade secrets:

1. Mounting of plates; 2. re-wind unit; 3. punch die holder;
4. clamp slide die holder; 5. centre drive shaft; 6. millroll brake; 7. infeed unit; 8. back printing; 9. ink distributor;
10. speed of press was the result of the adjustment of moving parts in such a manner as to produce greater efficiency of mass production; 11. collating and stitching parts; 12. rubber plates;
13. no doubt the tolerance and accuracy which is built into this machine (Ashton, discovery q. 248) is the result of many long years of research and experiment finally expressed into the co-ordination and properly adjusted interdependency of the component parts.

But I am not presently able, because of the lack of evidence, to find that they are still trade secrets.

Another feature was presented with considerable stress by both sides, namely, the effect of the correspondence exchanged between the parties, and particularly exhibits (in chronological order) 5, 6, 7, 4, 3, 10, 11, 12, 22, 8 and 9, as affecting Ashton's responsibility with reference to the supplying of work by the plaintiff to the defendant. I have given them consideration. Whether the above exhibits constitute evidence of a binding

contract or not, and if they do, whether it was broken or not by the plaintiff, is, I hold, in the premises of no consequence, so far as the trade secrets are concerned, and that is the issue herein. Suffice it to say that I have been unable to find anything in the said exhibits which releases Ashton in any manner from keeping secret any trade secret with which he may have become familiar while in the employ of the plaintiff.

It therefore becomes unnecessary to deal further with the said exhibits.

*Conclusions.*

The plaintiff having failed to satisfy me that the machine built by the defendant Ashton and described in para. 8 of the statement of claim embodies features which are presently trade secrets learned by Ashton whilst in the course of his employment with the plaintiff, the action is dismissed with costs.

*Action dismissed with costs.*

*Solicitors for the plaintiff: Gowling, MacTavish, Watt, Osborne & Henderson, Ottawa.*

*Solicitors for the defendants: McIlraith & McIlraith, Ottawa.*

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## [COURT OF APPEAL.]

**Rex v. The Ash-Temple Company Limited et al.**

*Criminal Law—Conspiracy—Corporate Accused—Evidence Required—Production of Documents, etc., from Possession of Company—Proof of Authority of Persons Acting in Name of Company—Knowledge of Directors or Officers.*

*Criminal Law—Conspiracy in Restraint of Trade—"Unduly" Lessening Competition—What Must be Proved—The Criminal Code, R.S.C. 1927, c. 36, s. 498(1)(d).*

It is well settled that conspiracy is one of the crimes that a company can commit, and that the necessary *mens rea* may be found in an officer, servant or agent authorized to act for it. *Rex v. I.C.R. Haulage, Limited et al.*, [1944] K.B. 551; *Director of Public Prosecutions v. Kent and Sussex Contractors, Limited*, [1944] K.B. 146; *Rex v. Fane Robinson Limited*, [1941] 2 W.W.R. 235, referred to. But the proof required in the case of a company differs somewhat from that required in the case of an individual. If the act relied on is that of an officer, servant or agent of the company, there must be evidence that he had authority from the company to perform the act. Mere possession of a document by a company, in the sense that the document was on its premises, and even in its files, may not, without more, afford ground for an inference that its contents have come to the knowledge of the board of directors, or of someone having authority from the company to deal with the matters to which the document relates. The burden is on the Crown to bring home the criminal acts charged to the accused companies as their acts, and if it asks the jury to draw inferences it must establish the facts required to support those inferences. *Sweeney v. Coote*, [1907] A.C. 221, referred to.

It is particularly important that material facts should be established where the charge is one, under s. 498(1)(d) of The Criminal Code, of conspiring to prevent or lessen competition unduly. It was plainly within the contemplation of Parliament that there may be an agreement that prevents or lessens competition, but that does not do so unduly. *Container Materials, Limited et al. v. The King*, [1942] S.C.R. 147 at 159; *Stinson-Reeb Builders Supply Company et al. v. The King*, [1929] S.C.R. 276, referred to. Even if the jury are able to find an arrangement to prevent or lessen competition, they cannot convict unless they can further find, on the evidence, that the word "unduly" could properly be applied to it.

*Criminal Law—Trials—Re-opening Crown's Case—Discretion of Trial Judge—Appeal—The Criminal Code, R.S.C. 1927, c. 36, s. 1013(4), as re-enacted by 1930, c. 11, s. 28.*

The question whether or not counsel for the Crown should be permitted, after he has closed his case, to re-open it in order to supplement the evidence already given is entirely one for the discretion of the trial judge, and the Court of Appeal should not interfere with his exercise of that discretion, even if there is a right of appeal upon this ground. *Rex v. Crippen*, [1911] 1 K.B. 149 at 157; *Rex v. Sullivan*, [1923] 1 K.B. 47; *Rex v. Gregoire* (1927), 60 O.L.R. 363; *Rex v. Kishen Singh* (1941), 56 B.C.R. 282, referred to. In any case, the Attorney-General has no right to appeal on the ground that the trial judge has wrongly refused to permit the re-opening of the case, since his right of appeal is limited to grounds involving questions of law alone, and the ruling of the trial judge, in the exercise of this discretion, does not involve a question of law, and he decides no question of law in refusing the motion.

AN APPEAL by the Attorney-General from a verdict of acquittal, returned on the direction of Barlow J.



27th, 28th, 29th and 30th September and 1st, 4th, 5th, 6th, 7th, 8th, 12th and 13th October 1948. The appeal was heard by ROBERTSON C.J.O. and HENDERSON, LAIDLAW, ROACH and HOPE JJ.A.

*D. L. McCarthy, K.C.*, for the Attorney-General, appellant: We had 2,000 documents, and to have presented them fully to the jury would have been an impossible task. Our position was made more difficult by the fact that the documents had to come from all over the country, and that there was a great lapse of time. The amendments to The Combines Investigation Act, R.S.C. 1927, c. 26, by 1946, c. 44, were designed to correct the situation revealed in *Rex v. Container Materials Ltd. et al.*, 76 C.C.C. 18, [1941] 3 D.L.R. 145, affirmed *sub nom. Container Materials, Limited et al. v. The King*, [1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529.

There was a mistrial here because the trial judge reversed his own position as to these documents. We selected particular documents intentionally, and the trial judge clearly ruled that they were admissible. On the strength of that ruling we put in over 500 exhibits. The trial judge must have ruled that the documents were evidence of the facts stated in them, since that was what the Crown sought to use them for, and this was the only ruling he made. When, at the end of our case, he indicated that he was about to change his position in this respect, I asked leave to call another witness, and this was refused.

The fact that these documents were admitted implies that we had satisfactorily proved that they came from the possession of one or another of the accused. Where a man keeps a document for a long time, the law assumes that he knows of its contents, and has acted upon it. The trial judge correctly ruled that the weight of the documents was a matter for the jury, and I submit that it was also for the jury, subject to his directions, to determine against whom a particular document was evidence. [HENDERSON J.A.: Surely it was entirely for the trial judge to rule on that. ROBERTSON C.J.O.: There are no special rules of admissibility in conspiracy cases; one conspirator cannot make an admission that will bind his co-conspirators. It is only acts done in furtherance of the conspiracy that are admissible in evidence. HENDERSON J.A.: Is your position that the whole mass of evidence is admissible against everybody who is linked

to the agreement?] Yes, subject to the trial judge's charge. I refer to *Rex v. Stephen, Allen and Douglas*, [1944] O.R. 339, 81 C.C.C. 283, [1944] 3 D.L.R. 656. The trial judge's decision is in effect that if these documents had been found in the possession of an individual they would prove his guilt, but that in the case of a company corporate authority must be proved. He put us on no terms that we must prove the corporate authority of the individual whose acts we relied on.

The distinction in *Rex v. Horne Tooke* (1794), 25 State Tr. 1, is between documents found in the possession of the accused, whether signed or unsigned, and those found in the possession of others, even if they are signed. I refer also to *Rex v. Hardy* (1794), 24 State Tr. 199.

*Peter Wright*, for the Attorney-General, appellant: I make the following submissions:

(1) The documentary evidence was properly admitted as coming from the possession of the accused. (2) Its weight depends in each case on the circumstances and is to be determined by the jury. (3) The trial judge was entitled to direct an acquittal only if there was no evidence, or only negligible evidence, on some essential point of the Crown's case. (4) We must show, as to corporate authority, either (i) that this proof was not essential to our case, or (ii) that there was in fact evidence of this authority. (5) The essence of the offence of conspiracy is an agreement, and this may be proved either formally or by inferences from the evidence. (6) The common design must be shown by evidence admissible against at least two of the accused, and thereupon the documents executed in furtherance of the common design become admissible against the others. (7) We must then link up each other one of the accused, by evidence against that accused. When this has been done, the evidence admissible against that accused becomes evidence against all.

If all these steps are properly taken, then all the documents, or practically all of them, become evidence against all the accused. The only ones that do not become evidence are those that are not made in furtherance of the conspiracy: *Rex v. Whitaker*, [1914] 3 K.B. 1283 at 1284-5.

The papers found in the possession of the Caulk company are admissible against it, and if these papers prove that the

company was a member of the Canadian Dental Trade Association then all papers of the association found in the possession of the company are admissible against it. The ownership of the documents is immaterial; the sole questions are possession and relevancy. I refer to *Raggett v. Musgrave* (1827), 2 C. & P. 556, 172 E.R. 252; *Alderson et al. v. Clay* (1816), 1 Stark. 405 at 407, 171 E.R. 511.

As to proof of corporate existence, the appearance of these accused by counsel proves that they are corporations. We had to prove only that these companies were the persons who had conspired: *Rex v. Pelissiers, Limited*, 35 Man. R. 404, 45 C.C.C. 161, [1926] 1 W.W.R. 189, [1926] 1 D.L.R. 574.

The documents show that all the members of the association, throughout the period 1930 to 1947, agreed to limit competition in the dental trade in Canada unduly by organizing the dominant group in that trade into an association in which they agreed: (a) to restrict membership to the existing dealers; (b) not to sell manufacturers' goods to non-members for resale; (c) to sell only at agreed or fixed prices, published in the price-book; (d) to handle used and refinished equipment only at fixed prices; (e) to give uniform discounts, terms and conditions of sale to customers of the same class; (f) to curb all normal competition in the trade among members; and (g) to co-operate fully with each other.

[Counsel here proceeded with a detailed examination of the exhibits, with reference to each of the accused companies.]

The rule of law applying to all these documents is: (1) it is for the trial judge to find whether the documents are sufficiently connected with the accused to be admissible at all; and (2) it is then for the jury to determine their weight in the light of all the circumstances. I rely on the following authorities: *Rex v. Grahme* (1691), 12 State Tr. 645; *Rex v. Francia* (1717), 15 State Tr. 897; *Rex v. Laver* (1722), 16 State Tr. 93; *Rex v. Hardy* (1794), 24 State Tr. 199; *Rex v. Horne Tooke* (1794), 25 State Tr. 1 at 120-1; *Reg. v. O'Donnell et al.* (1848), 7 State Tr. N.S. 637 at 686-7; *Rex v. Casement*, [1917] 1 K.B. 98; *Rex v. Russell*, [1920] 1 W.W.R. 624, 33 C.C.C. 1, 51 D.L.R. 1; *Rex v. De Berenger et al.* (1814), Gurney's report, pp. 49-53, 223-4 (reported 3 M. & S. 67, 105 E.R. 536); *Rex v. Hashem*, 15 M.P.R. 205, 73 C.C.C. 124, [1940] 1 D.L.R. 527.



As to proof of authority, it is not necessary to prove the corporate offices held by the persons attending the meetings of the association, but only that those persons represented the companies. As against a particular company, the minutes of the association are evidence of the authority of the person named in the minutes as representing that company to act for it at the meeting: *Rex v. Whitaker*, [1914] 3 K.B. 1283 at 1284-5; *Rex v. Mean* (1904), 69 J.P. 27 at 28; *Gilbert v. McDonald and Kemp* (1889), 28 N.B.R. 102, affirmed 16 S.C.R. 700 at 701.

The position of a corporation in criminal law, and particularly under s. 498 of The Criminal Code, R.S.C. 1927, c. 36, is no different from that of an individual, and the doctrine of *respondeat superior* applies in criminal law: *Chuter v. Freeth & Pocock, Limited*, [1911] 2 K.B. 832; *Director of Public Prosecutions v. Kent and Sussex Contractors, Limited*, [1944] K.B. 146, [1944] 1 All E.R. 119; *Rex v. Famous Players*, [1932] O.R. 307 at 348, 58 C.C.C. 50.

*D. A. Keith*, for the Attorney-General, appellant, had nothing to add.

*J. R. Cartwright, K.C.* (*D. I. W. Bruce*, with him), for The Dominion Dental Company Limited and Goldsmith Bros. Smelting and Refining Company, Limited, respondents: The appeal is from the decision, and not from the reasons, of the trial judge. While we submit that the reasons are correct, there are many other fatal defects in the Crown's case.

The test at the close of the Crown's case was: Was there evidence admissible against each particular accused of every essential ingredient of the offence? These essential ingredients are: (1) that the accused conspired with one or more of the others named in the indictment, within the period specified; (2) that it so conspired to lessen competition; (3) that it did in fact lessen competition "unduly": *Rex v. Container Materials Ltd. et al*, 74 C.C.C. 113, [1940] 4 D.L.R. 293 at 306, varied 76 C.C.C. 18, [1941] 3 D.L.R. 145 at 192, which was affirmed *sub nom. Container Materials, Limited et al. v. The King*, [1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529.

As against my clients, the whole case is based upon the documents. But on this record none of the documents is evidence against any accused of anything at all. None of them was admissible even for the limited purpose of showing knowledge

on the part of the company concerned, and in no possible way can the Crown rely on any document as establishing the truth of the facts stated in it.

This case differs from others because no witness was called with respect to the creation, sending, receiving or keeping of any of these documents. Many of them are unsigned, and in the case of those which do bear signatures it is not proved who in fact signed them. There is no evidence that any of these individuals held office in any company, or even that he was employed by it. There is no witness to prove the truth of anything contained in any of the documents, nor is there any proof of acts done by the corporations in pursuance of the documents, or of a "system" of any of them. By themselves, they are the merest hearsay, and not admissible at all.

The theory on which the documents are put forward by the Crown is based upon a misapplication of the rules that make a document, to some extent, admissible against an accused from whose possession it comes. To prove that a document came from the premises of an accused company is not the same as proving that it comes from the accused's possession; it takes no account of the vast difference between accused individuals and accused corporations. The principles on which documents coming from the possession of an accused are admissible against him are set out in Phipson on Evidence, 8th ed. 1942, pp. 134, 242-3; 13 Halsbury, 2nd ed. 1934, pp. 564-5, para. 637; Wigmore on Evidence, 3rd ed. 1940, ss. 245 (vol. 2, p. 43), 260 (*ib.*, p. 80), 1073 (vol. 4, p. 90).

The Court cannot infer assent to the facts stated until the Crown brings home to the accused knowledge of the contents of the documents, and this can be done only by showing that the board of directors, as such, acquired knowledge, or that knowledge was acquired by someone to whom had been delegated the duty of acquiring knowledge or receiving information: *Evans v. Employers Mutual Insurance Association, Limited*, [1936] 1 K.B. 505 at 515.

Possession by these corporations is not proved. The Crown proved only that the documents came from premises said by the seizing officers to be those of the companies. There was no evidence of title, lease, etc., or whether the premises were shared with others. Before possession on the part of a company can be

said to be proved it must be shown affirmatively that the documents were in the possession of someone who had authority from the company to have them. There is no evidence that these documents were in the possession of anyone who had any duty in respect of them.

The statement of a person on the premises that he is the president of the company is not evidence against the company: *Wigmore, op. cit.*, s. 1078 (vol. 4, p. 123).

There is no proof of any corporate act recognizing any of these documents. In the *Container Materials* case, *supra*, the minute-books were all proved by other evidence. It is not even enough to show that a man was an officer of a company, without also showing what his duties were: *Bruff v. The Great Northern Railway Company* (1858), 1 F. & F. 344, 175 E.R. 757; *The Great Western Railway Company v. Willis* (1865), 18 C.B.N.S. 748, 144 E.R. 639; *In re Devala Provident Gold Mining Company* (1883), 22 Ch. D. 593 at 595.

As to the criminal responsibility of corporations, I refer to *Rex v. Canadian Allis-Chalmers Limited* (1923), 54 O.L.R. 38, 48 C.C.C. 63; *Rex v. Fane Robinson Limited*, [1941] 2 W.W.R. 235, 76 C.C.C. 196, [1941] 3 D.L.R. 409; *Rex v. I.C.R. Haulage, Limited et al.*, [1944] K.B. 551 at 559, 30 Cr. App. R. 31; *Director of Public Prosecutions v. Kent and Sussex Contractors, Limited*, [1944] K.B. 146, [1944] 1 All E.R. 119.

Even if knowledge were brought home to the companies, the documents can be evidence of the truth of their contents only if the Crown proves some corporate act or an act done by someone with authority to act for the company. It is not correct to say that such proof as this would be impossible. The witnesses could have been called.

As to my two clients in particular, the Crown did not even prove that the documents came from our possession. The photostat copies were not admissible, since they were not proved by any witness to have been compared with originals: *Wigmore, op. cit.*, s. 1278 (vol. 4, p. 564); *Phipson, op. cit.*, p. 531. No notice to produce was given by the Crown as a foundation for proving copies: *Rex v. Morgan*, [1925] 1 K.B. 752. The copies are not admissible under The Combines Investigation Act, R.S.C. 1927, c. 26, as amended by 1946, c. 44, because there was no evidence



either that the Commissioner directed that the copies be made, or that the original documents were in his possession for the purposes of the investigation.

*C. F. H. Carson, K.C. (J. G. Middleton, with him)*, for The L. D. Caulk Company of Canada Limited, respondent: I adopt the argument submitted by Mr. Cartwright, and submit further that there was no evidence of undue lessening of competition. There was no proof of any agreement, so far as my client was concerned.

It is not an offence to prevent or lessen competition, unless it is done "unduly". There is nothing illegal in a manufacturer (i) fixing the retail price of his own products; (ii) setting the discount he will allow his dealers; (iii) selecting his own distributors; or (iv) declining to supply his goods through dealers who are not acceptable to him; or in all four together. Nor is there anything illegal in an agreement among dealers to adhere to the prices fixed by manufacturers for their products.

Further, it is not illegal for two or more manufacturers to agree to fix the wholesale or retail prices, or both, of similar products, and at the same time agreeing not to sell to particular dealers, unless it is proved that such an agreement lessens competition unduly. The common law position is set out in *North Western Salt Company, Limited v. Electrolytic Alkali Company, Limited*, [1914] A.C. 461.

The Crown must show that there has been a virtual monopoly: *The Ontario Salt Company v. The Merchants Salt Company* (1871), 18 Gr. 540; *Hately v. Elliott* (1905), 9 O.L.R. 185; *Rex v. Elliott* (1905), 9 O.L.R. 648, 9 C.C.C. 505; *Wampole & Co. v. F. E. Karn Co., Limited* (1906), 11 O.L.R. 619; *Rex v. Clarke (No. 1)* (1907), 14 C.C.C. 46, affirmed 1 Alta. L.R. 358, 14 C.C.C. 57, 9 W.L.R. 243; *MacEwan v. Toronto General Trusts Corporation* (1917), 54 S.C.R. 381, 28 C.C.C. 387, 35 D.L.R. 435; *Dominion Supply Co. v. T. L. Robertson Manufacturing Co. Limited* (1917), 39 O.L.R. 495, 34 D.L.R. 740; *Weidman v. Shragge* (1912), 46 S.C.R. 1, 20 C.C.C. 117, 2 D.L.R. 734, 2 W.W.R. 330, 21 W.L.R. 717; *Container Materials Limited et al. v. The King*, [1942] S.C.R. 147 at 152, 77 C.C.C. 129, [1942] 1 D.L.R. 529.

Here there was no evidence at all as to: the total volume of business done in Canada; the proportion of that business done

by members of the association; the number of manufacturers whose products competed; the total number of dealers who were not members of the association; the volume of goods available from or through non-association sources; the extent of the impairment, if any, of the dental supply trade. We took this position squarely at the trial. I refer to *Sarnia Brewing Company Limited v. The King*, [1929] S.C.R. 646, [1930] 1 D.L.R. 306.

As to circumstances justifying a directed verdict, I refer to *Jones v. Great Western Railway Company* (1930), 144 L.T. 194; *Parratt v. Blunt and Cornfoot* (1847), 2 Cox C.C. 242; *Reg. v. Smith* (1865), Le. & Ca. 607, 169 E.R. 1533; *Sweeney v. Coote*, [1907] A.C. 221; *Rex v. Comba*, [1938] S.C.R. 396, 70 C.C.C. 205, [1938] 3 D.L.R. 719; *Walker v. The King*, [1939] S.C.R. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353.

*J. W. Pickup, K.C.*, for The Dental Company of Canada Limited and subsidiary companies, respondents: As to the refusal of the motion to re-open, the trial judge's decision was quite justified. Counsel for the accused had already announced their decision to call no witnesses. There were only two names on the indictment, and both those persons had been called as witnesses. The Crown did not allege any inadvertence, but stated that the course pursued had been deliberately adopted. The trial judge dealt with the motion on the very principles raised by Crown counsel.

The Crown, having failed to make out a case on the basis on which it elected to proceed, is not entitled to a further opportunity to make it out on a different basis: Tremear's Criminal Code, 5th ed., 1947 supplement, p. 149; *Wexler v. The King*, [1939] S.C.R. 350, 72 C.C.C. 1, [1939] 2 D.L.R. 673, 45 R. de Jur. 373; *Savard and Lizotte v. The King*, [1946] S.C.R. 20, 85 C.C.C. 254, 1 C.R. 105, [1946] 3 D.L.R. 468.

Even if the decision of the trial judge were open to criticism, there would still be no right of appeal based upon it, since the matter was in his discretion, and there is no question of law alone involved, to justify an appeal by the Crown.

*J. L. McLennan, K.C.*, for Paterson & Paterson Incorporated, respondent: As to my client, there is no proof at all of corporate existence. Although in civil cases corporate existence cannot be put in issue unless it is expressly pleaded (Rule 153), this rule does not apply to criminal cases, and an accused is en-

titled to raise that issue under s. 905 of The Criminal Code. There can be no inference of corporate existence from the presence of the word "incorporated" in the respondent's name. The Quebec Companies Act, R.S.Q. 1941, c. 276, does not provide, as do the Dominion and Ontario Acts, 1934 (Dom.), c. 33, and R.S.O. 1937, c. 251, that the word "limited", or any designated word, shall form part of a corporate name. This case is distinguishable from *Chuter v. Freeth & Pocock, Limited*, [1911] 2 K.B. 832, referred to by counsel for the appellant.

(Counsel also adopted the arguments of counsel who had preceded him, and discussed the documents in so far as they related to his client, pointing out the distinctions between the proof adduced in this case and that made in the *Container Materials* case, *supra*.)

*J. D. Arnup* (*W. H. Sparrow*, with him), for The Ash-Temple Company Limited and Equipment Manufacturing Company Limited, respondents (after adopting the argument of other counsel and discussing the documentary evidence): The rule as to the admissibility of counterparts is limited to communications, and does not extend to multiple copies of documents. It does not apply in the case of a chain, and a copy of a letter, together with the original reply, cannot be taken as part and counterpart. Further, the rule does not apply where, as here, several copies of a document are found in the possession of different persons.

*J. J. Robinette, K.C.* (*John Stratton*, with him), for S. S. White Company of Canada Limited and Cook-Waite Laboratories Incorporated, respondents: It cannot be argued that Crown counsel were misled by anything the trial judge did or said, and he was quite correct in refusing the motion to re-open. Crown counsel asked leave to call one further witness only, to prove the signatures on some of the documents already admitted. The trial judge admitted these documents in evidence on the Crown's application, and to have allowed the re-opening of the case would have violated both the principle that the onus is on the Crown and the double-jeopardy rule. Both rulings of the trial judge are right, and they are not inconsistent or contradictory. His first ruling was on the question whether the documents constituted any evidence, while his second ruling was that they did not furnish enough evidence to go to the jury. Further, the decision whether to permit the re-opening of the case is entirely within



the discretion of the trial judge, and there is no appeal to this Court from a discretionary ruling of a trial judge: *Rex v. Mulvihill* (1914), 19 B.C.R. 197, 22 C.C.C. 354, 5 W.W.R. 1229, 18 D.L.R. 189 at 194, 26 W.L.R. 955; 49 S.C.R. 587, 23 C.C.C. 194, 18 D.L.R. 217, 6 W.W.R. 462.

A managing director has no implied authority from his company: *Foley v. Commercial Cars Limited*, 52 O.L.R. 174 at 178, [1923] 2 D.L.R. 453. A single director is not an agent of the company, and notice to one director is not notice to the company: *Almon et al. v. Law et al.* (1894), 26 N.S.R. 340 at 346; *In re Marseilles Extension Railway Company; Ex parte Crédit Foncier and Mobilier of England* (1871), L.R. 7 Ch. 161 at 168.

*G. A. Martin, K.C.*, for The Williams Gold Refining Company of Canada Limited, respondent: A mere erroneous ruling by the trial judge is not sufficient to support an appeal; the appellant must show that if the ruling had not been made there would probably have been a different result: *White v. The King*, [1947] S.C.R. 268, 89 C.C.C. 148, 3 C.R. 232. Even assuming that these documents had been admitted without qualification, and there had been no second ruling, the result would have been the same, since no properly instructed jury could have convicted on the evidence. The only wrong of which the Crown can complain is that the trial judge deprived it of the opportunity of securing a verdict which would not have been supportable on the evidence. No appellant can assign error in his own favour: *Rex v. Hughes et al.*, 58 B.C.R. 189, 78 C.C.C. 305 at 307, [1942] 3 W.W.R. 480, [1942] 4 D.L.R. 535.

As to what acts may be imputed to a corporation, I refer to Stephen's Digest of the Criminal Law, 8th ed. 1947, p. 3. The principle *respondeat superior* is not applicable in criminal law.

*J. W. Pickup*, for National Refining Company Limited, respondent; *J. F. Perrett*, for Maritime Dental Supply Company Limited and The British Columbia Dental Supply Company Limited, respondents; and *C. L. Dubin*, for Novocol Chemical Manufacturing Company of Canada Limited, respondent, also argued.

*D. L. McCarthy, K.C.*, in reply: Once documents are read to the jury they are evidence; this is inescapable. In the *Container*

*Materials* case, *supra*, 285 documents were admitted, of which only 141 were subsequently proved, the other 144 never having been authenticated in any way.

As to ordering a new trial in similar circumstances, I refer to *Dempsey v. London & South Western Railway* (1918), 11 B.W.C.C. 224; *Silk v. Isle of Thanet Rural District Council* (1913), 6 B.W.C.C. 539. *Jessop v. Maclay & M'Intyre* (1911), 5 B.W.C.C. 139; *Rex v. Fontaine and Lacasse* (1930), 65 O.L.R. 173 at 175, 53 C.C.C. 164.

*Peter Wright*, in reply: The Crown need not prove that the agreement did in fact lessen competition. We are required to prove only that it was one which, if carried into effect, would, in the opinion of the tribunal of fact, result in an undue lessening. [ROBERTSON C.J.O.: Where the agreement had apparently been in force for some 18 years, one would think that there would be abundant evidence of its effect. Must there not be some evidence of its operation—the number of persons in the trade, the business generally, and so on?] I submit not: *Rex v. Elliott* (1905), 9 O.L.R. 648, 9 C.C.C. 505; *Rex v. Master Plumbers and Steam Fitters Co-operative Association, Limited et al.* (1907), 14 O.L.R. 295 at 300, 12 C.C.C. 371 (*sub nom. Rex v. Central Supply Association, Limited*); *Weidman v. Shragge* (1912), 46 S.C.R. 1 at 20, 20 C.C.C. 117, 2 D.L.R. 734, 2 W.W.R. 330, 21 W.L.R. 717

The cases do not establish any necessity for showing that there has been a “virtual monopoly”. It is a question for the jury in each case whether the interference with competition is “undue”. Three large houses could combine to drive out of business more numerous but less wealthy competitors: *Rex v. McMichael* (1907), 10 O.W.R. 268, 18 C.C.C. 185; *Rex v. Elliott, supra*; *Rex v. Master Plumbers, supra*; *Wampole & Co. v. F. E. Karn Co. Limited* (1906), 11 O.L.R. 619. It is a reasonable inference that if men agree to fix prices they believe they can resist competition. Any fixing of prices by agreement is *prima facie* “undue”.

As to the authority of the officers, I refer to *Booth v. Helliwell*, [1914] 3 K.B. 252.

*Cur. adv. vult.*

28th February 1949. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the Attorney-General of Ontario against the verdict of acquittal of all the accused on an indictment for an offence against s. 498(1) (d) of The Criminal Code, R.S.C. 1927, c. 36, given by way of a verdict directed by Mr. Justice Barlow, on the 18th March 1948, on the trial of the accused at Toronto with a jury.

The accused, who are the present respondents, are eighteen incorporated companies, all of them engaged in what is known as the dental supply business in Canada, seven of the companies being manufacturers and eleven of them dealers.

The indictment was preferred against the respondents, and a true bill was found by the grand jury at Toronto on 16th January 1948, whereby it was charged that the respondents: "during all the years from 1930 to 1947, both inclusive, did, within the jurisdiction of this Honourable Court unlawfully conspire, combine, agree or arrange together, and with one another, and with [certain named persons and corporations, forty-two in number], to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply in the cities of Toronto and Montreal and other places throughout Canada, of articles or commodities which may be a subject of trade or commerce; namely, new, used and refinished dental equipment, artificial teeth, precious metals used in dentistry and dental treatment, dental sundries, and other articles or commodities used in dentistry and dental treatment and did thereby commit an indictable offence contrary to the provisions of the Criminal Code, Section 498, Subsection 1(d)."

After certain motions by the respondents in regard to particulars of the indictment, and after certain particulars had been given, all the defendants appeared by counsel and elected trial by jury, and each entered a plea of not guilty. The prosecution had in its possession a great number of letters, copies of letters and other documents obtained, in some instances, in response to requisition by mail upon some of the accused, and in other instances by search of the files of others of the accused. At the trial the Crown found it convenient first to identify, as coming from the possession, or from the files, or the premises, of one or another of the accused, certain documents done up in bundles, and books and single papers or documents. Each bundle, book



or single paper or document, on being so identified, was given a distinguishing letter, and was marked for identification, and left in the custody of the Court, although not yet admitted in evidence. Then, as the Crown desired to put in evidence any document from one of these bundles, it was taken out of the bundle marked only for identification and was tendered in evidence, and, if admitted, it was given a number and marked as an exhibit. Some 532 books, papers and documents were admitted in evidence and marked as exhibits in the course of the trial, most of them going through the process I have outlined.

There was much argument as to the admissibility of the first of this series of documents tendered in evidence. It became exhibit no. 7. This was an unsigned document of several typewritten pages, which counsel for the Crown extracted from bundle "L", produced by the witness H. C. McGuire, a sergeant of the Royal Canadian Mounted Police, as containing documents from the possession of the L. D. Caulk Company of Canada Limited, one of the accused. In tendering the document counsel for the Crown said that the basis for putting this particular document in evidence was that it came from the possession of the Caulk company; that the Crown appreciated that until there was proof satisfactory to the Court of the whole conspiracy it would not be evidence against the other conspirators, but that it was open to Crown counsel to undertake to make such proof, and that the evidence was admitted subject to that undertaking. Objection was taken, by counsel for a number of the accused, to the admission of this document, and a long argument followed, occupying over fifty pages of the record. The document contains what purport to be the minutes of the annual general meeting of the Canadian Dental Trade Association of 16th and 17th December 1930. No witness had been called, nor was any witness afterwards called, to identify the contents of this document as the minutes, or a copy of the minutes, of a meeting of the Association. Nor was any witness called to say that there had been a meeting of the Canadian Dental Trade Association at the time indicated in the document, or at any other time. No witness was called to say who were the members of the Association, or that any of the persons who, according to the exhibit, were present at the meeting, in fact represented any of the accused, or anybody else.

Among the many grounds of objection taken to the admission of ex. 7 in evidence were the following: that it was not proved that the document came from the possession of the Caulk company, rather than from the files of the Dental Trade Association; that the document was unsigned and was not shown to contain the minutes of a meeting actually held; that knowledge of the document or its contents was not traced to any person; that it was not shown that the Caulk company, or anyone representing it, concurred in anything that was set forth in the document; that in the case of an incorporated company it is not sufficient to prove merely that a document was found on the premises of the company—it must be shown that there was corporate possession; that in order that an incorporated company, prosecuted criminally, should be deemed to have knowledge of the contents of a document found among its papers, it must be established by evidence, either that the board of directors had knowledge of it, or that the duty of ascertaining the relevant facts of the matter had been delegated to some officer of the company, and that neither was shown in this case; that the document could not in any event be evidence against a company that was not shown to have been a member of the Association, or even shown to have been in business until long after the date appearing in the document; that the contents of this document, purporting to be minutes of a meeting of an association, could not become evidence against other conspirators, if there were any, merely from its being found in the possession of one alleged conspirator; that there are no rules of evidence applicable in conspiracy cases other than the rules of evidence applicable generally in criminal cases, and that any apparent difference in the application of the rules of evidence in charges of conspiracy arises from the fact that an agency exists among persons shown to be parties to a conspiracy; that this document, whatever its value may be as evidence against one in whose possession it is found, could not become evidence against anyone else who is not shown to have had knowledge of it.

After hearing the argument the learned trial judge ruled that this document was admissible as evidence. He thereupon addressed the jury as follows:

“HIS LORDSHIP: Gentlemen of the jury, after having listened to argument from counsel I have ruled that the first document

that will be read to you is admissible as evidence, but let me say one or two words to help you direct your minds to it, gentlemen.

"As this trial proceeds, your first duty will be to determine whether or not there is a conspiracy, whether there is a design among some or all of the accused to conspire. Once you have come to that conclusion, then you will next ascertain which of the accused and what ones of the companies of the accused are parties to that conspiracy.

"Now, the conspiracy may have proof directed towards it by acts of individual conspirators or of evidence of greater or less weight that certain ones were conspirators, and then I will direct you more fully later, of course, gentlemen, that you may draw certain inferences from all the evidence when we finally hear it all.

"This statement that will now be read to you came from the possession of the Caulk company, one of the accused. You heard the evidence given as to this, that certain papers of the Canadian Dental Trade Association were also in that office and, at the present time, gentlemen, it is not evidence against anyone, except, perhaps, the Caulk company. But that is entirely for you, as I will subsequently direct you on the evidence that you have heard, and I shall also, when I charge you further, gentlemen, tell you that you are the sole judges as to the weight which is to be given to this document as evidence in this trial."

I have quoted from the submission of counsel for the Crown in presenting the document as evidence, and the remarks addressed to the jury by the trial judge, for the reason that they give an indication of much that followed in the course of the trial.

The trial continued for many days, occupied principally in the putting in of exhibits extracted from the bundles of documents received from or found in the files or on the premises of some one of the accused companies, and in argument for and against their admission in evidence. The argument was not always a mere repetition of the contentions in relation to the admission of ex. 7, although one or more of the grounds of objection taken in respect of that document frequently became the ground of objection to others. The basis of much of the contest over the admission of the evidence tendered for the prosecution may, I think, be most clearly indicated, with reasonable brevity, by calling attention to certain matters in respect



of which the Crown did not offer direct evidence, but relied upon inferences which, it was submitted, could properly be made from what was directly proved. No witness was called to give evidence to establish that any of the accused companies had been incorporated as early as 1930, or to fix definitely the time of their commencing business. No witness was called to establish the magnitude of the business of the accused in comparison with the total business in dental supplies in Canada. No witness was called to prove any by-law, resolution, minute or other corporate act of any of the accused having any relation to the making or the carrying out of or acting upon any agreement such as is charged against them as a conspiracy. No witness was called to prove what persons occupied official positions in any of the accused companies, or to prove that any person had been appointed to act for, or to represent, any of the accused in respect of any of the matters charged against them. No witness was called to prove the handwriting of any person upon any letter or document that purported to be signed by such person, nor to prove that any such person had authority to sign such letter or document on behalf of any of the accused. In cases where the exhibit purported to be a letter from or to one of the accused, or to the officer or agent of one of the accused, no witness was called to establish that any of the accused had acted upon or approved or in any way adopted the contents of the letter.

The centre of the conspiracy alleged by the Crown was the Canadian Dental Trade Association, an unincorporated association of which the accused were alleged, in the particulars of the indictment, to be all the present members. Para. 2 of the particulars is as follows:

“The offence charged in the Indictment was in connection with the association of the accused and their co-conspirators in the Canadian Dental Trade Association, its activities, meetings, committees and groups and with the business activities of the accused and their co-conspirators in the articles or commodities described in the Indictment.”

No witness was called to give evidence as to meetings of this Association, or as to its membership or its activities. Documents such as ex. 7, already referred to, which purported to be copies of or extracts from minutes of meetings of the Association,

were found in the possession or upon the premises of several of the accused. A few of them bore what appear to be signatures, but the signatures were not proved. No witness was called to prove anything about these documents, except the place where they had been obtained by the police in the course of their investigations, and even as to that there was, in some cases, a measure of uncertainty. No minute-book of the Association was put in. There was a good deal said, in the course of the trial, about price-books found on the premises of a number of the accused and filed as exhibits. These price-books are put forward as the work of the Association. There is no direct evidence of their preparation by the Association. Neither is there evidence of any witness testifying to the use made of these price-books by any of the accused, or to any agreement by any of the accused to be bound by them, or to any general practice among the accused to charge the price listed in the price-books.

Only one witness was called for the prosecution who was a dealer in dental supplies, all the other witnesses being either members of the Royal Canadian Mounted Police or employed in the Department of Justice or the Provincial Secretary's office. This witness was Dr. Alphonse Plessis-Belair, of Westmount, Quebec. He is a graduate dentist and general manager of the Dépôt Dentaire, a dental supply house in Montreal. This witness testified to the inability of his company to purchase dental supplies from certain of the accused, and to having had quoted to him, on certain occasions, the same price for the same article by several of the accused.

At the conclusion of the case for the Crown, counsel for the defence submitted to the Court that there was no evidence to submit to the jury, and asked that the jury should be directed to enter a verdict of acquittal. The argument of this motion occupied the major part of three days, and at the opening of the argument counsel for the defence informed counsel for the Crown that their present view was not to call any evidence should their motion not be granted. On the completion of this argument the trial judge reserved his decision and adjourned Court until the afternoon of the following day. When the trial was resumed in the afternoon of the next day counsel for the Crown made an application for leave to supplement the Crown's case in chief by calling a witness to prove certain documents

which had been put in evidence by the Crown, and he asked the trial judge to re-open the case. Counsel did not disclose the identity of the witness, nor indicate the particular documents the witness was to be called to prove. He supported his application by argument. At the conclusion of his argument the learned trial judge refused the motion, and in doing so made the following remarks:

“HIS LORDSHIP: In this case the Crown has closed its evidence, and defence counsel have stated that they do not propose to call any evidence. It would appear to me on the cases, and on the argument to which I have just listened, that this is a discretionary matter; and that the exercise of that discretion turns upon: (1) whether it would be in the interests of justice; (2) whether it would be to the prejudice of the accused; (3) whether it was by inadvertence that the Crown’s case was closed without calling the evidence now sought to be called.

“It has not been shown to me during the last three days that I have listened to argument on the motion that I should direct the jury to bring in a verdict, that there was any inadvertence.

“Further, the English cases, as I understood them when they were read to me, dealt with the matter on the basis of rebutting evidence where the defence has adduced evidence, and then it has been considered that certain further evidence should be called.

“It must always be remembered that in criminal cases, regardless of any suspicion the Court may have, the Court at all times must endeavour to be fair, and appear to be fair, and do nothing that might at any time prejudice or seem to prejudice the accused. I do not think I need to say anything further.

“I must refuse your motion, Mr. McCarthy.”

The jury had been excluded during the argument of the motion on behalf of the accused for a directed verdict and the argument of the application by counsel for the Crown to re-open the case, and was now brought in. The learned trial judge addressed the jury and said that after careful consideration he had come to the conclusion that he must direct them, as a matter of law, to find the accused not guilty, and he proceeded to tell them why. After reminding the jury that questions of law were for him, and that it was his function to rule on the admis-



sibility of evidence, and that they must take their law from him, he pointed out the obligation of the Crown to prove the guilt of the accused by proper and sufficient evidence in accordance with the laws of evidence, and that in the case of an incorporated company it can only have a mind or act through its duly elected officers, or by some one else who is authorized by the company. The learned trial judge then proceeded as follows:

“What do we find in this case?

“There have been filed in this court various documents. You will remember there were certain minutes of what was called the C.D.T.A. (The Canadian Dental Trade Association); but with the exception of two instances, if I recollect correctly, where they were signed by somebody called ‘D. L. Lawrie’, over the typed word ‘Secretary’, the others are not even signed. You have on those documents the name of a company, and then represented by so-and-so, two names, but it does not say that they are officers of the company, and there is no authority shown that they had any right to act for the company. There has been no evidence given in this court that they had authority to act for the company, or even that they were officers of the company.

“Then, we have letters that have been filed and copies of letters that have been filed, but there is no proof that the people who wrote those letters wrote them with the authority of the company. There is no proof of any of the signatures to the original letters. There has been nobody called with respect to the copies to say: ‘Yes, I wrote that, and it is a copy dictated by Mr. So-and-so, president of this company.’ Nobody is called with reference to that.

“Now, this is basic, gentlemen, for all the evidence that has been given in this court-room, and, without such proof as I have indicated to you, there is no proof that the companies in themselves ever authorized anybody to do anything, and they are the accused.

“I give it to you, as a matter of law, gentlemen, that that is fatal to the Crown’s case, that there is no proof against these accused. It matters not what you and I might think about it, they must be proved guilty.

“Then there is a further point, as I direct you to bring in a verdict of not guilty—and I am not necessarily resting upon this

—it has been argued before me, and there may be considerable in it, that there is no actual proof of the corporate existence throughout the period from 1930 to 1947 of these accused companies. I have grave doubt as to whether it may not be vital, but the other is vital. In all the evidence that has been given nobody has been called to definitely prove corporate existence and that being the case I have no alternative in law but to direct you to bring in a verdict of not guilty, and I propose to so endorse the indictment.”

After the verdict of not guilty had been assented to by the jury and recorded, the jury was discharged.

The first ground taken by counsel for the Attorney-General on this appeal was that the trial judge was wrong in refusing to re-open the case to give the Crown the opportunity of supplementing its evidence.

In my opinion the re-opening of the case for the prosecution was a matter in the discretion of the trial judge, and the Court of Appeal should not interfere with his exercise of that discretion, even if there is a right of appeal by the Attorney-General from the judge's decision upon this ground. In his argument supporting the motion to re-open the case, counsel for the Crown made it plain that it was in the discretion of the trial judge to grant his motion, and he cited authorities, among them *Rex v. Crippen*, [1911] 1 K.B. 149 at pp. 157 *et seq.*; *Rex v. Sullivan*, [1923] 1 K.B. 47; *Rex v. Gregoire* (1927), 60 O.L.R. 363, 47 C.C.C. 288, and *Rex v. Kishen Singh*, 56 B.C.R. 282, 76 C.C.C. 248, [1941] 2 W.W.R. 145, [1941] 3 D.L.R. 341. In each of these cases the discretionary character of the judge's order is emphasized. No question was raised here as to the power of the trial judge to make the order Crown counsel asked him to make, nor did the trial judge doubt his jurisdiction. Having regard to the circumstances of the case, he exercised his discretion by refusing to make the order applied for. The trial judge, having observed the whole course of the trial from its beginning, was in a better position to exercise a proper discretion on this matter than a Court of Appeal can be. A week had elapsed from the close of the evidence for the prosecution before application was made to re-open the case to permit the Crown to give more evidence. Counsel for the accused had announced their intention to call no evidence and, it may be presumed, had relieved from further

attendance any witnesses they might have had available to meet the case for the Crown, if a case had been made. It was not by reason of any change of position on the part of the defence, nor of the discovery of fresh evidence by the Crown, that the decision was made to apply for leave to call more evidence. Neither was there any accidental omission by prosecuting counsel to call evidence. The constant objections by counsel for the accused to the admission of documents in evidence without further proof, had been a prominent feature of the trial. It would have been a considerable indulgence to counsel for the Crown to re-open his case to permit evidence to be called to supply deficiencies in the proof of the case to which attention had been called by opposing counsel since early in the trial.

This appeal by the Attorney-General can be maintained only upon "a ground of appeal which involves a question of law alone": s. 1013(4) of The Criminal Code, as re-enacted by 1930, c. 11, s. 28. The cases cited by counsel for the Crown in argument before the trial judge, and to which I have already referred, were all cases in which the person convicted complained, and there is nothing in them to support a right of appeal which is limited to a question of law alone. This ruling of the trial judge in the exercise of his discretion, on a consideration of the facts before him, did not involve a question of law, and he decided no question of law in refusing the motion. In my opinion it is impossible to support this appeal upon the ground of the refusal of the trial judge to re-open the case and to permit the prosecution to adduce the further evidence indicated.

The main contention put forward by counsel supporting the appeal was that the learned trial judge was wrong in law in ruling that there was no evidence against the accused, and in directing the jury to bring in a verdict of not guilty. To support a conviction it was necessary that the Crown should establish, by evidence properly admissible, that there had been an agreement or conspiracy to which the accused, or some of them, had become parties, and that the purpose of the agreement or conspiracy was to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply as charged in the indictment of articles or commodities used in dentistry and dental treatment, as more particularly set forth in the indictment.



In considering the evidence on which the Crown relies, it is of importance to remember that the accused are all incorporated companies. It is not suggested by counsel for the accused that a company cannot be guilty of the crime of conspiracy, having no mind of its own. It is well settled that conspiracy is one of the crimes that a company can commit, and that the necessary *mens rea* may be found in an officer, servant or agent authorized by the company to act for it: *Rex v. I.C.R. Haulage, Limited et al.*, [1944] K.B. 551, 30 Cr. App. R. 31, [1944] 1 All E.R. 691; *Director of Public Prosecutions v. Kent and Sussex Contractors, Limited*, [1944] K.B. 146, [1944] 1 All E.R. 119; *Rex v. Fane Robinson Limited*, [1941] 2 W.W.R. 235, 76 C.C.C. 196, [1941] 3 D.L.R. 409. The proof required, however, in the case of a company differs somewhat from that required in the case of an individual. If the act relied on is that of an officer, servant or agent of the company, there must be evidence that he had authority from the company to perform the act. Mere possession of a document by a company, in the sense that the document was on its premises, and even in the company's files, may not, without more, afford ground for an inference that its contents had come to the knowledge of the board of directors, or of someone having authority from the company to deal with the matters to which the document relates.

No attempt was made by the Crown to show, from the minute-books of any of the accused companies, that its board of directors had ever been concerned either in the making or in the carrying out of the arrangements upon which the charge of conspiracy is based. There is no evidence that any officer, servant or agent of any of the accused companies had any authority to act for the company in these or, for that matter, in any other matters. There is no evidence of any circumstances that might make it more or less probable that any document put forward as evidence had come to the knowledge of the board, or of some one authorized to act for the company. There is no evidence when or from what source such documents as the copies of alleged minutes of the Canadian Dental Trade Association came into the possession of the companies with which they were found.

In a case where it is the companies who are charged, and no one else, and where the companies, if anyone, are to be found

guilty and punished, the criminal acts charged must be brought home to the companies as their acts. That burden of proof is placed upon the Crown. In such a case as this it would seem that there should be available evidence of the way in which the accused companies carried on their respective businesses. The conspiracy is alleged to have continued in each of the years from 1930 to 1947 inclusive, and to have extended throughout Canada. If the charge is true, there should be abundance of evidence available of the conduct of the accused in the carrying on of their respective businesses that would afford support to the charge. Yet all that appears on this record of any attempt to adduce such evidence is to be found in the exceedingly vague and indefinite statements of Dr. Plessis-Belair.

This absence of evidence of facts that would support the Crown's case is of importance, when so much of the Crown's case is based upon inference. A jury may draw reasonable inferences, but reasonable inferences cannot be drawn without some knowledge of the facts, and the burden is upon the Crown, in asking that inferences be drawn, to establish facts that it is necessary to know to make proper inferences. Anything less than that is mere guessing: *Sweeney v. Coote*, [1907] A.C. 221.

A great many letters and copies of letters were filed as exhibits upon evidence by a member of the police that they had come from the possession of some one of the accused. As to many of these exhibits there was no evidence whatever that such a letter had been in fact sent by any one of the accused. There are other instances, however, where the original of a letter was got from the possession of the person to whom it was directed, and a copy of it was found in the possession of the sender. There is, however, one objection common to all the letters. There is no evidence that the writing of any of them was authorized by any of the accused companies, nor is there evidence that anyone having authority to bind the company had any knowledge of the sending of any of the letters or of their receipt or of their contents.

The omission of the Crown to give evidence of material facts is of particular importance in view of the presence of the word "unduly" in the indictment and in the Code. Plainly, it was in the contemplation of Parliament that there may be an agreement that prevents or lessens competition, but does not do so

unduly. In *Container Materials, Limited et al. v. The King*, [1942] S.C.R. 147 at 159, 77 C.C.C. 129, [1942] 1 D.L.R. 529, Mr. Justice Kerwin discussed the meaning of the word "unduly", and after referring to the dictum in *Stinson-Reeb Builders Supply Company et al. v. The King*, [1929] S.C.R. 276, 52 C.C.C. 66, [1929] 3 D.L.R. 331, that any party to an arrangement, the direct object of which is to impose improper, inordinate, excessive or oppressive restrictions upon free competition, is guilty of an offence, he proceeded as follows: "Once an agreement is arrived at, whether anything be done to carry it out or not, the matter must be looked at in each case as a question of fact to be determined by the tribunal of fact upon a common sense view as to the direct object of the arrangement complained of." I fail to see how the jury in this case, assuming them to have found that there was an agreement to prevent or lessen competition, could find anything in the evidence upon which to determine that the word "unduly" could properly be applied to it.

There remains to be considered a further submission by counsel for the Crown. It was urged upon this Court that the learned trial judge had, in the course of the trial, ruled upon the admissibility of many of the exhibits filed, and that when directing the jury that there was no evidence to support a conviction, he had reversed his own former rulings. I am not sure whether this was put forward as a further reason for reversing the trial judge's order refusing to re-open the case, to allow the Crown to give further evidence, or whether it was intended as an independent ground of appeal in the event that the Court should be of the opinion that the trial judge's final ruling upon the evidence was right.

In my opinion it is by no means clear that the learned trial judge was inconsistent in his rulings upon evidence. It seems to me that, leaving the responsibility to support the conviction that was sought by evidence properly admissible, with counsel for the Crown, the trial judge assumed that counsel for the prosecution would not close his case without calling witnesses to complete the essential proof of the documents marked as exhibits. In a case of this character it must often occur that all the evidence in respect of a letter or other document that it is desired to put in, cannot be given by one witness. The exhibit is allowed to go in upon the understanding that further evidence will be



given, supporting its admissibility, and if such further evidence is not forthcoming, then the exhibit goes out. Something of this character occurred in connection with ex. 7, to which I have already made extended reference. But irrespective of what the learned trial judge may have thought when admitting exhibits, it was his solemn duty in the end, when addressing the jury, to give the ruling that, in his opinion, was right. It seems hardly right that counsel for the Crown should complain. They had their own way in making their case. It would have been of little service to anyone if the trial judge, in presenting the case to the jury, had proceeded upon incorrect rulings upon the admissibility of evidence. It may be assumed that such a procedure would have been put right later.

Upon the whole case, for the reasons I have stated, I am of the opinion that the appeal fails and should be dismissed.

*Appeal dismissed.*

*Solicitor for the Attorney-General, appellant: C. R. Magone, Toronto.*

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[COURT OF APPEAL.]

Garvey et al. v. The Town of Meaford.

*Real Property—Land Bounded by Non-navigable Stream—General Rule of Construction—Ownership ad medium filum aquae—Boundary Traced along Bank—Whether Contrary Intention Shown.*

*Waters and Watercourses—Non-navigable Stream—Ownership of Riparian Lands—Description of Land as Bounded by Bank—Applicability of General Rule of Construction—Ownership ad medium filum aquae.*

Where land is described in a conveyance as bounded by the bank of a non-navigable stream, and there is nothing in the circumstances to exclude the general rule of construction, the grantee will be deemed to be the owner of the bed of the stream *ad medium filum aquae*. *Williams v. Pickard* (1908), 17 O.L.R. 547; *Kains v. Turville* (1871), 32 U.C.Q.B. 17; *Maclaren et al. v. The Attorney-General for Quebec*, [1914] A.C. 258, applied; *Robertson v. Watson* (1875), 27 U.C.C.P. 579; *Coleman v. Robertson et al.* (1880), 30 U.C.C.P. 609, distinguished.

AN APPEAL by the defendant from a judgment of McFarland J.

20th January 1949. The appeal was heard by ROBERTSON C.J.O. and ROACH and AYLESWORTH JJ.A.

*J. J. Robinette, K.C.*, for the defendant, appellant: The plaintiffs do not own any part of the river bed, but their lands are bounded by the bank. The description in the deed from Purdy to Chapman, in 1873, is expressly made with reference to the left bank, and the deed does not in terms, or by implication, convey any part of the bed. The actual measurements on the ground make this clear, especially in view of the fact that the only fixed monument is a post 7 chains  $3\frac{1}{2}$  links west of Seymour Street. The top of the left bank was the limit of a mill-pond referred to in the grant of 1873. The length of the base of the peninsula, from water to water, is now within about five feet of the measurement earlier referred to, and the slight difference may be explained by erosion. It would be completely wrong if the measurement were from right bank to right bank.

The *ad medium filum* rule is not applicable to this conveyance since the description in the 1873 conveyance excludes it. Where the line is described as following a bank, and not the water's edge, the rule is inapplicable. The bank is the place beyond which high waters will not go. [ROBERTSON C.J.O.: It does not necessarily mean the top of the bank.] That may apply to the first monument, but the post I have referred to is apparently fixed by a measurement extending across the river. Where there are posts in a fixed position, the monuments must prevail

over distances or courses. [ROBERTSON C.J.O.: That rule has sometimes been carried too far by surveyors. The Act does not say as much as some surveyors think.] The description here is unique. It starts with a fixed post, and then follows the bank, not the edge of the water. One post is fixed by a measurement taken from across the river. All these factors together exclude the *ad medium filum* rule: *Coleman v. Robertson et al.* (1880), 30 U.C.C.P. 609; *Robertson v. Watson* (1875), 27 U.C.C.P. 579. *Williams v. Pickard* (1908), 17 O.L.R. 547, is distinguishable in that there the description expressly ran to the river. The presumption, or rule of construction, may be met either by the description itself or by the surrounding circumstances: *The King v. Fares et al.*, [1932] S.C.R. 78, [1932] 1 D.L.R. 421. It is not applicable until it is shown that the lands extend to the water. If they do, then one examines the surrounding circumstances to see whether there is any evidence of an intention to exclude the bed of the stream. Here, the description does not run to the edge of the water, but even if this submission is incorrect, the surrounding circumstances are sufficient to rebut the presumption. This property has always been residential. In 1873 Purdy retained other lands, and he had a dam and a woollen factory downstream. There was no reason for him to pass title to the middle of the stream, and there was a good commercial reason for not doing so. [ROBERTSON C.J.O.: He kept all he needed, which was an easement covering all damage which might be caused by flooding the land.] Yes, he reserved the right to flood it. From 1873 to 1942 this part of the river was used as a mill-pond.

There is one point in this case upon which there appears to be no authority. What there was here was a natural waterway, artificially dammed. The rule surely applies only to a natural waterway in its natural condition, and therefore the conveyance must have been only to the bank of the mill-pond. In 1878 Purdy conveyed at least part of the mill-pond. The evidence is that the waters were backed up to the south end of the peninsula, thus extending the mill-pond to that point, and this embraces the entire area from which gravel was taken.

This matter was not settled, as alleged, in 1945. The agreement dated 9th April of that year was not signed by the defend-



ant, and it did not conform to a resolution of the council dealing with a proposed settlement of the dispute. No by-law was passed approving any settlement.

The damages awarded by the trial judge were excessive, and there is no support in the evidence for such an award. If we are required, as we are by the trial judgment, to restore the bed of the river to its former condition, there can be no damage at all.

*Wilfred Judson, K.C.*, for the plaintiffs, respondents: In normal times these gravel beds were completely attached to the land. The iron post referred to is of no value as a guide, since it was embedded in concrete, to form a retaining wall. It was not an original monument, and has no significance here. The measurements of the surveyor Eagleson fail, since he does not establish where the west side was in 1873, or where he commenced to measure. We know the width of Seymour Street in 1933, but there is no evidence to show what it was in 1873, and unless that is established the measurements are valueless. Eagleson had to establish that his point of commencement was correct according to the description, and he failed to do so. The description commences at the west bank of the river, and there is nothing to show that the person who drew the 1873 conveyance did not look at the bank as it was at that particular point. In subsequent conveyances of the mill-pond this bank is referred to as the north bank, because the river at that point actually flows from east to west.

If there is any ambiguity in the deed from Purdy to Chapman, it must be resolved in favour of the grantee; this principle is as old as the common law: 10 Halsbury, 2nd ed. 1933, p. 60. As to the subsequent conveyance of the dam, such a conveyance cannot be evidence to limit our title. The Town, claiming through one Randall, had no right whatever, since they never obtained anything south of Miller Street, where the dam stopped.

As to the *ad medium filum* rule, this case is indistinguishable from *Williams v. Pickard*, *supra*. The law appears to be that there is no room for fine distinctions in such matters: 33 Halsbury, 2nd ed. 1939, p. 561. *The King v. Fares et al.*, *supra*, while it contains a clear statement of the principles, is based upon facts bearing no resemblance to this case. The rule of construction was applied in *Micklethwait v. Newlay Bridge Company* (1896),

33 Ch. D. 133 at 145, and that case was even stronger than the present one.

The mere reservation of a right to flood cannot prevent the application of the rule, which is not easily rebutted: *The Keewatin Power Company v. The Town of Kenora*; *The Hudson's Bay Company v. The Town of Kenora* (1908), 16 O.L.R. 184 at 192.

Even if we are not entitled to all, or half, the bed of the stream, we are entitled to the gravel beds by right of accretion: *Clarke v. The City of Edmonton et al.*, [1930] S.C.R. 137, [1929] 4 D.L.R. 1010.

As to the damages, the trial judge was entitled to consider the conduct of this municipality, which had trespassed repeatedly despite our protests. The damages were a punitive award for an arrogant trespass: 10 Halsbury, 2nd ed. 1933, p. 113.

*J. J. Robinette, K.C.*, in reply: This cannot be a case of accretion, because the gravel beds have always been there, covered by water. They were merely bared, in 1942, by the breaking of the dam.

*Cur. adv. vult.*

29th March 1949. The judgment of the Court was delivered by

AYLESWORTH J.A.:—This is an appeal by the defendant corporation from the judgment of Mr. Justice McFarland dated 6th February 1948. The dispute between the parties arose by reason of certain operations carried on by the servants of the appellant in and about the bed of the Big Head River opposite the respondents' lands in the town of Meaford whereby certain sand and gravel was removed from the river bed upon the respondents' side of the stream and the contour of that part of the river bed was altered by the shifting of gravel therein by the operation of a bulldozer. The respondents brought action claiming an injunction to restrain such operations by the appellant, a mandatory injunction requiring the appellant to restore the river bed to its former condition, and damages. At the trial the pleadings were amended so as to include a further claim by the respondents that the action, or the respondents' claims upon which the action was brought, had been settled by an agreement between the parties.

The learned trial judge granted the respondents an injunction restraining the appellant from trespassing upon the respondents' lands, a declaration that said lands included the whole of the river bed in front of the respondents' lands, and \$1,000 damages, together with costs of the action. Very brief reference is made in the trial judge's reasons for judgment to the respondents' claim as to settlement of the action. This point was not seriously pressed by respondents' counsel and no further reference need be made to this phase of the action except to say that respondents cannot succeed upon it; there was indeed no evidence of any agreement binding upon the appellant corporation and if there were, the respondents have not framed their action as a suit upon the agreement, but adopted the anomalous procedure of founding their action upon claims of an entirely different nature and then pleading that those claims have been settled by agreement between the parties.

It is to be noted that the respondents did not claim for a declaration of ownership of the river bed, although such declaration is included in the judgment. On the contrary, respondents' counsel at trial made the following statement:

"I think I can clarify my position exactly. I think, my Lord, in law it is arguable that we own the whole bed of the river; I do not intend claiming that in respect of this river; what I am relying on is that we own to the middle of the stream. We really never have contended for anything more, although I might say that we are entitled to it."

To appreciate the various submissions made during argument of the appeal, it is desirable to keep in mind a general description of the relevant site. The Big Head River, which is not navigable, pursues generally throughout its length a serpentine course with many bends and twists, but in the result its waters work their way in a north-easterly direction to empty into Georgian Bay at Meaford. Directly opposite respondents' lands the river takes a "U" turn and forms the respondents' boundary on three sides. The following description of the respondents' lands is taken from the original grant thereof from Purdy to Chapman dated 3rd May 1873 and registered as no. 2169 in the Registry Office for the County of Grey.

"All and singular that certain parcel or tract of land and premises situate lying and being in the said Village of Meaford



in the said Township of St. Vincent County of Grey and Province of Ontario, which said parcel or tract of land is marked letter 'A' on the Plan of the same, as a portion of Lot Number Fifteen in the Fifth Concession of said Township of St. Vincent, and may be known and described as follows, that is to say: Commencing where a post has been planted at the intersection of the South side of the road allowance between lots fifteen and sixteen in the said fifth concession (otherwise known as Miller Street) with the West Bank of the Big Head River, thence following the various curves and windings of said Big Head River down stream, along the said West bank thereof to a post planted at the intersection again of the said West bank of said Big Head River with the aforesaid South side of road allowance between lots fifteen and sixteen in the said fifth concession which said post is 7 chains  $3\frac{1}{2}$  links more or less from the West side of Seymour Street in said Village of Meaford, thence continuing along South side of said road allowance on a South Westerly course a distance of 4 chains and 50 links more or less to the place of beginning and containing by admeasurement one acre two roods thirty three and one half perches more or less."

This conveyance contains a reservation to the Grantor as follows: "And subject also to any flow of the said Bighead [*sic*] River which may at any time hereafter be caused or made on the land and premises hereby granted by backing the water by the dam at the woolen factory of the said party of the first part."

Appellant contends that respondents are not the owners of any part of the river bed, or alternatively that they own only *ad medium filum aquae*. The quantum of damages or, if an injunction is to be granted against appellant, the right in the circumstances to any damages is also challenged. In this court respondents assert ownership in the whole of the river bed opposite their lands or, failing in that, ownership *ad medium filum aquae*, and also claim title to the gravel beds by right of accretion.

I think respondents' submission that they are the owners of the entire width of the river bed must fail so far as this action is concerned. Quite apart from what has already been said upon this point, the onus is upon them in these proceedings to prove such a title, for upon such proof rests their right to the

broad relief actually prayed for. To prove their title to the whole of the river bed they bring forward a conveyance containing an ambiguous or doubtful description. We have been informed by counsel that the plan marked "A" referred to in the conveyance of 1873 has not been located, and, further, that no plan, registered or otherwise, is presently available showing the precise position in 1873 of Seymour Street, with respect to the location of which street certain measurements of the respondents' lands are postulated. However, such plans as were made exhibits at the trial, and such measurements as were given in evidence, while not conclusive, certainly in my view throw very serious doubt upon the interpretation of the description of the respondents' lands as contended for by them so far as ownership of the entire width of the river bed is concerned, and, as I have already said, I think the respondents fail in this contention.

Entirely different considerations arise as to the alternative submission, namely, that the respondents own the river bed (and therefore the gravel beds) *ad medium filum aquae*. Does the description in the conveyance of 1873 give rise to the presumption, or, more strictly speaking, to the rule of construction, in favour of riparian owners whose property abuts upon non-tidal or, in this Province, upon non-navigable waters and, if so, is there anything in the conveyance itself or in the circumstances existing at the time of the conveyance which makes that rule of construction inapplicable?

The description under consideration describes the boundary of the demised premises as commencing at a post planted at the intersection of the road allowance between lots 15 and 16 with "the west *bank* of the Big Head River, thence following the various curves and windings of said Big Head River down stream *along the said west bank* thereof to a post planted at the intersection again of the said west *bank* of said Big Head River with the aforesaid south side of road allowance." (The italics are mine.) Undoubtedly there are decisions of Courts in this Province which would appear to afford some support to appellant's contention that under the description in question the river bed to the middle thread of the stream was not conveyed to respondents' predecessor in title. Of such authorities the most notable are perhaps *Robertson v. Watson* (1875), 27 U.C.C.P. 579, and *Coleman v. Robertson et al.* (1880), 30 U.C.C.P. 609.

The former was distinguished by the Court of Appeal in *Williams v. Pickard* (1908), 17 O.L.R. 547, to which reference will later be made. In *Coleman v. Robertson* the land was described as "Commencing on the verge of the river Moira at low water mark" and then after describing the first two courses, the third course was stated to be "to the water's edge of the said river Moira at low water mark" and it concluded "thence down with the winding of the said river to the place of beginning". Wilson C.J. held that the particular limitation, that is, "at low water mark", must be construed specifically as stated, so that the land must be deemed to extend merely to the low water mark and not *ad medium filum aquae*. At p. 620 he says:

"A grant of land to the river, or margin or edge of it, or to the bank, or along the river, will *prima facie* carry the grant to the *medium filum aquae*; but this description is from a particular point, 'the verge of the river at low water mark', and the returning line to the water is expressed in like way, 'to the water's edge of the river at low water mark', and thence with the winding of the stream to the place of beginning, that is, to the verge of the stream at low water mark."

The italics are my own and I think afford the key to distinction of the actual *ratio* of that case from that which is to be considered here.

In *Williams v. Pickard*, *supra*, the description read: "Beginning at a post marked 4/5 on the bank of the river Thames, thence south 45° east 68 chains, then north-easterly parallel to the said river 30 chains, then north 45° west to the said river, then along the bank with the stream to the place of beginning."

This description was held by the Court of Appeal to be subject to the *ad medium filum* rule, and to include one-half of the river bed. *Robertson v. Watson* was distinguished on the special wording of the description in that case, which was from a post "on the top of the bank" and the river course of which description was "along the top of the bank", and also on the ground that a particular clause in the deed itself negated the application of the rule. The Court then quoted with approval the following extract from the judgment of Draper C.J. in *Kains v. Turville* (1871), 32 U.C.Q.B. 17:

"The law is too well settled to require any extended reference to authorities to establish the rule that in streams and rivers



which are not navigable a description of land which extends to the water's edge, or to the bank, carries the grant or conveyance to the thread of the stream; and that the description continuing along the water's edge, or along the bank, will extend along the middle or thread of the stream, unless indeed there be some words, forming part of the description, or introduced by way of exception, which clearly excludes whatever may lie between the water's edge or the bank, and the *medium filum aquae*."

I have been unable to find a more lucid statement of the rule and the reason for it than as expressed by Lord Moulton in delivering the judgment of the Privy Council in *Maclaren et al. v. The Attorney-General for Quebec*, [1914] A.C. 258 at 272-3, 15 D.L.R. 855, 6 W.W.R. 62, 14 E.L.R. 297, 20 R.L.N.S. 248. The description under consideration in that case was contained in letters patent from the Province of Quebec of certain lands along the River Gatineau. The letters patent described the lands as being "bounded by the river" but in addition gave detailed boundaries which were stated to start from a post upon the bank of the river, to describe a certain course inland therefrom, then to return to another post at a higher point on the river bank, and "thence along the bank of the river following its sinuosities as it winds and turns to the place of beginning". The passage which I now quote begins at p. 272 and extends to the following page:

"In some of the judgments in the Courts below the learned judges have held that the presumption that the bed of the river *ad medium filum aquae* was included in the grant is negated by the fact that the metes and bounds of the parcels forming the townships as described in the letters patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed. If there is any indication of the parcel going further there is no place for its operation . . .

"In construing the parcels in a document affecting land, say for example a grant, the law treats the parties as describing the

land of which the full use and enjoyment is to pass to the grantee. But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquae* or *viae* the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream. This is precisely what we have here. The land is shewn as abutting on the river and is described as bounded by the river, and again as bounded by a line following the windings and sinuosities of the river bank. This clearly makes it abut on the river and gives rise, according to English law, to the presumption in question."

In my opinion the reasoning so clearly stated in the above-quoted passage applies with equal force to the case at bar. I think the rule of construction applies to the description in question and that, therefore, the onus is upon the appellant to show something in the conveyance itself or in the surrounding circumstances which will make the rule *ad medium filum aquae* inapplicable.

In 1873, when Purdy made the conveyance under which respondents' title originates, he owned and operated a woollen factory downstream from the lands conveyed and a dam at or near the mill site. This dam created and maintained a mill-pond which extended upstream as far as part, if not all, of the lands now owned by respondents. Reference has already been made to the reservation in the conveyance reserving in Purdy a right to flood the premises conveyed. These circumstances are relied upon by appellants as demonstrating Purdy's intention not to convey the river bed and as negating the ordinary rule of construction applicable to riparian grants. I do not accede to this submission. If such had been the intention of the grantor he could have preserved the right to back up the waters of the river to the full extent of the river bed and to the full height of the banks

of the river by withholding from the demise by appropriate description any part of the river bed itself. In my own view the limited right actually preserved is inconsistent with reservation of anything greater. Be that as it may, the reservation actually made is at least neutral upon the point, if one gives it the construction most favourable to the appellant, and appellant's defence therefore fails.

The respondents are therefore entitled to an injunction restraining appellant, its servants, workmen and agents from trespassing upon respondents' lands, including the bed of the Big Head River *ad medium filum aquae*, and to a mandatory injunction requiring the appellant to restore said lands to their condition before occurrence of the acts thereon of appellant in respect of which complaint is made.

A perusal of the evidence, so far as the same concerns the claim for damages, satisfies me completely that there is no basis for the award as to damages made by the learned trial judge, and that the damages actually proved were nominal only. Such damages as were incurred will be completely satisfied under the terms of the judgment as amended in accordance herewith and none therefore should be awarded to the respondents.

The judgment, as varied, will carry the costs of the action in favour of the respondents. Success in this court being divided, I would make no order as to costs of the appeal.

*Judgment varied.*

*Solicitor for the plaintiffs, respondents: Fred G. MacKay, Owen Sound.*

*Solicitor for the defendant, appellant: Campbell Grant, Walkerton.*

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## [COURT OF APPEAL.]

**Re Bailey Construction Company and The Township of Etobicoke.**

*Arbitration—Review of Award by Court—When Award may be Set Aside—“Misconduct” by Arbitrator—Error of Law appearing on Face of Award—Allowance on quantum meruit.*

Although an arbitrator's award may be set aside for an error of law appearing on the face of the award, this can only be done if there can be found in the award itself, or a document actually incorporated with it, an erroneous legal proposition that is the basis of the award. The mere fact that the arbitrators have decided a question of law that has been referred to them differently from the way the Court would have decided it is not sufficient. It must appear that they “have tied themselves down to some special legal proposition which then, when examined, appears to be unsound”. *Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company, Limited*, [1923] A.C. 480; *Attorney-General for Manitoba v. Kelly et al.*, [1922] 1 A.C. 268; *Re Beaver Wood Fibre Co. Limited and American Forest Products Corporation* (1920), 47 O.L.R. 590, quoted and applied.

*Building Contracts—Implied Terms—Recovery on quantum meruit.*

Where a schedule of prices is incomplete, and the contractor is under an obligation to perform a class of work for which no price is fixed in the schedule, he will be entitled to recover for that class of work at a reasonable rate, on the basis of a *quantum meruit*. 3 Halsbury, 2nd ed. 1931, para. 454, agreed with.

AN APPEAL by Bailey Construction Company from an order of Barlow J., setting aside in part an award of arbitrators.

2nd February 1949. The appeal was heard by HENDERSON, ROACH and HOPE JJ.A.

*J. L. G. Keogh, K.C.* (*J. L. Pond*, with him), for the appellant: We were entitled to compensation for the Township's delay. Art. 6 of the contract does provide for delay, but that must be a reasonable delay, if the Township is to be excused. Here there was a delay of 41 days on a four-month contract, caused by the Township's failure to supply materials according to the contract, and this was wholly unreasonable, and resulted in the keeping of men and equipment idle.

As to the hard pan, the engineer at first made a special allowance for the excavation of this material but when it was found that there was a large quantity of it he deferred his decision until the job was completed, and later refused to pay more than for the excavation of earth. We were led to change our position, believing that an increased allowance would be made.

An award of arbitrators can be set aside only if there is a mistake of law appearing on the face of the award; otherwise it is final and binding: *Re Confederation Coal and Coke Ltd. and*

*Bermingham et al.*, [1939] O.R. 157, [1939] 1 D.L.R. 420. Here there was no mistake of law on the face of the award, and Barlow J. had consequently no jurisdiction to set it aside. This goes to the right of the arbitrators to make an allowance on the basis of a *quantum meruit*. As to delay excusing the Township, the arbitrators' finding was one of fact. It was within their power to deal with this question under the terms of the contract, because it is a financial consideration relating to our work. There is no dispute as to the quantity or nature of the material. There is no definition of "earth" in the contract, but this was clearly a material not covered by the contract, and the arbitrators had a right to fix a fair rate for its excavation. There is no power in the Court to set aside an award because of erroneous findings of fact: *Re The Urban District Council of Walton-on-the-Naze and Morton* (1905), 2 Hudson's B.C. 4th ed., 376. There are authorities indicating that the Court is entitled to look only at the contract, the award and the reasons: *Re Walton-on-the-Naze*, *supra*; 3 Halsbury, 2nd ed. 1931, p. 257, para. 454; Hudson on Building Contracts, 7th ed. 1946, p. 309. There is no unsound legal principle here to which the arbitrators have "tied themselves": *Chamsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company, Limited*, [1923] A.C. 480.

Alternatively, the contract, by art. 17, gives the engineer the power to increase the price where unusual circumstances arise; see also art. 22. The arbitrators could do anything the engineer could do, where financial considerations were involved. [HENDERSON J.A.: The engineer exercised this power, and recognized your client's right to be paid for this material. Would he then have a right to change his position?] No: *Mills v. Continental Bag and Paper Co.* (1918), 44 O.L.R. 71 at 72, 74, 45 D.L.R. 389. [ROACH J.A.: In that case, what is the effect of art. 17, which says that the decision of the engineer shall be final and binding and not subject to appeal?] That clause is overridden by the concluding part of the article. I rely also on *Brodie v. Corporation of Cardiff*, [1919] A.C. 337 at 367.

A. A. Macdonald, K.C. (J. W. Collins-Williams, with him), for the respondent: If the effect of the concluding words of art. 17 of the contract is to nullify the extensive powers given to the engineer earlier in the same article, it should be rejected as inoperative; the earlier provision should be given effect. Art.

6 clearly excuses the municipality for delay, and there is a finding that the condition arose entitling them to be excused, and, unless there is a distinction between inability and impossibility, the saving clause applies. [HENDERSON J.A.: How is the arbitrators' decision in that respect an error in law?] They cannot make a new contract for the parties.

As to the hard pan, the arbitrators were dealing with something outside the contract, and clearly had no jurisdiction. In any event, the contract defines "rock", and everything not within that definition is categorized as "earth". The arbitrators had no power to make an allowance on a *quantum meruit*. We are not estopped by having appeared on the arbitration, since the contractor argued that all this material should be paid for as rock, and if that had been found the matter would have come within the contract. The engineer had no power to change the contract. The moment that this material was found to be neither rock nor earth, the arbitration was over, since there was no further jurisdiction: *Bottoms v. Lord Mayor, etc. of The City of York* (1892), 2 Hudson's B.C., 4th ed. 208; *Bush v. Trustees of Port and Town of Whitehaven* (1888), 2 Hudson's B.C., 4th ed. 122 at 129, 131, 132. [ROACH J.A.: When the contractor came upon this hard pan, could he have stopped work?] [HOPE J.A.: His contract required him to excavate.] *Monro v. Bognor Urban District Council*, [1915] 3 K.B. 167 at 170-1. If this work was an extra, then art. 22 of the contract provides that extras shall be undertaken only with the written consent of the engineer. The *Walton-on-the-Naze* case, *supra*, is distinguishable from the case at bar. On a fair reading of the contract here it is obvious that the intention was that anything that was rock should be paid for as such, and that everything else should be classed as earth. The company had an opportunity to examine the area, and stated, in its tender, that it had made investigations. It should have discovered that this substance was there, and should have tendered accordingly.

The words "financial consideration" in the contract merely define the starting-point of the arbitration.

Where there is a difference of opinion as to the authority of an arbitrator or umpire, the decision must ultimately rest with the Court: *Attorney-General for Manitoba v. Kelly et al.*, [1922] 1 A.C. 268 at 276, 62 D.L.R. 370, [1922] 1 W.W.R. 576. A party



who protests the jurisdiction of an arbitrator is not bound to withdraw: *Hamlyn v. Betteley* (1880), 6 Q.B.D. 63.

Where the contract is clear, the arbitrators are bound by its terms, and cannot give themselves jurisdiction to ameliorate its provisions for the benefit of one party: *Re Thomas & Sons and Hackett*, 14 M.P.R. 33, [1939] 2 D.L.R. 332 at 338.

*J. L. G. Keogh, K.C.*, in reply.

*Cur. adv. vult.*

4th April 1949. The judgment of the Court was delivered by

HOPE J.A.:—This is an appeal from an order of Barlow J. dated the 23rd September 1948, setting aside in part an award dated the 28th May 1948, of C. R. Young Esq., J. F. MacLaren Esq., and A. W. F. McQueen Esq., arbitrators, in a submission to them as arbitrators under a contract between the appellant company and the respondent municipal corporation.

The parties to the arbitration had, under date the 26th September 1946, entered into an agreement for the construction of a sewer within the municipality. The contract and specifications dealt only with the excavation of "rock" and "earth". During the course of the construction the contractor encountered a substance which was claimed to be neither rock nor earth, but is found by the arbitrators to be "hard pan". When this was first encountered the company brought to the attention of the municipal engineer the matter of the rate of payment for excavation of this hard substance. The engineer at the outset allowed payment of a substantial percentage of the "hard pan" then excavated at the rate of "rock" in order to compensate the contractor for the additional work. The question of payment for further excavation of this hard substance was again raised with the municipal engineer, who requested that the matter be allowed to remain in abeyance until the completion of the contract. When the contract was completed, the engineer would only allow payment at the rate stipulated for "earth" excavation. The claim for a larger amount for this type of excavation formed the main item referred to the arbitrators. There were also other smaller items for damages due to delay, etc.

The award granted payment for the excavation of the hard material on what was stated to be a *quantum meruit* basis. Four items claimed by the contractors were entirely disallowed by the

arbitrators and three items, namely, for outlet manhole, for additional work in spring break-up and for time lost due to delayed delivery of pipe, totalling \$4,703.43 were each allowed in part for a total of \$1,747.50. In short, the order appealed from set aside the award allowing to the Bailey Construction Company in part items 1, 6 and 7(a) of their claim, but sustained the award as to item 3 of the claim and as to the costs of the arbitration.

No written reasons were given by Barlow J., but by agreement of both counsel on this appeal a transcript of the oral reasons, taken in shorthand by one of the counsel on the motion, was accepted and filed herein. These reasons are as follows:

"I am of the opinion that the arbitrators have power under art. 17 of the contract to proceed with the arbitration, but I am further of the opinion that in their award they have proceeded on the wrong principle because so far as page 2 of the award is concerned it is clear to me that there is no provision to justify them in granting an allowance on what they themselves call a *quantum meruit* basis. They have also proceeded on a wrong basis under items 6 and 7(a) in their interpretation of art. 6 of the conditions. The award is set aside except as to item 3, and except the disposition made by the arbitrators of the costs."

It appears that before the arbitrators counsel for the municipal corporation took the position that the arbitrators did not possess jurisdiction to deal with the matter. This was argued on the motion to set aside the award, and was again argued by counsel for the respondent in this Court, particularly with respect to item 1, namely, the award for increased compensation on a *quantum meruit* basis for the excavation of the "hard pan". It will be noted from the learned judge's reasons that he upheld the jurisdictional right of the arbitrators to proceed with the arbitration. No cross-appeal by the municipality was taken from this finding of the learned judge to this Court. In my opinion the matter is therefore not now in review.

As is stated in Russell on Arbitration and Award, 12 ed. 1931, p. 221: "... submission to arbitration is a method of settling disputes of the parties' own choosing, and persons who submit know or ought to know that they take the arbitrator for better or for worse, and that the award of the person to whom they submit has the peculiar characteristic that it is final both in fact and law."

In the present case the terms of the submission to arbitration, as found in art. 17 of the agreement appended to the award, provide that "the decision of this Board of Arbitration on any matter in dispute shall be final and binding on both parties". Moreover, The Arbitration Act, R.S.O. 1937, c. 109, under which the arbitration proceeded, provides, by Schedule A, clause (k), which is imported into the agreement by virtue of s. 5 of the Act, as follows: "The award to be made . . . shall be final and binding on all parties. . . ."

Pursuant to the terms of the agreement between the parties dated the 26th September 1946, the parties executed a further agreement dated the 18th February 1948, appointing the arbitrators and providing for their remuneration and expenses and the payment thereof.

This latter agreement was not filed on the original motion before Barlow J., but at the request of this Court and by agreement of counsel subsequent to the hearing of the appeal, it has now been filed as one of the documents referred to in the award. This latter agreement contained the following three recitals relating it to the original agreement, dated the 26th September 1946, *viz.*:

"WHEREAS the said parties entered into an agreement under date of the twenty-sixth of September, 1946, in respect to the construction of certain storm sewers in the Township of Etobicoke,

"AND WHEREAS the said agreement contained certain provisions for arbitration in the event of differences arising between the parties,

"AND WHEREAS such differences have arisen and the parties have resorted to arbitration pursuant to the submission contained in the same agreement."

While it is not necessary for me to rely on the terms of these recitals, nevertheless it is of interest to find that they go to confirm my opinion, earlier expressed, that the question as to the correctness of the learned judge's finding that the arbitrators had power to proceed under art. 17 is not now open to question. Even if it were a subject to be dealt with on this appeal, I find that I am in complete accord with his finding.

What, then, of the correctness of the setting aside of the award in part, namely, with respect to items 1, 6 and 7(a) of the



claim? The learned judge held in respect of item 1 that the arbitrators had proceeded on the wrong principle because there was no provision to justify them in granting an allowance on a *quantum meruit* basis.

In 3 Halsbury's Laws of England, 2nd ed. 1931, at p. 257, para. 454, it is stated:

"In case the schedule of prices is incomplete, and the contractor is under an obligation to perform some particular class of work for which no price is fixed in the schedule, that class of work will have to be paid for at a reasonable rate, unless the contract provides some other manner of ascertaining its value, such as by referring the matter to some independent person as *quasi*-arbitrator. Such a claim would be in the nature of a *quantum meruit* and would be a liquidated demand."

I am of the opinion that the contract was silent as to the rate of payment for excavation of this "hard pan" material which could be classed neither as "rock" nor as "earth", which two latter terms were not defined in the contract as inclusive of all material which might be encountered in the course of the contract. Further, I am of the opinion that the engineer of the municipality recognized the principle of *quantum meruit* to meet the peculiar situation which arose, and in adopting his method of allowing part of the cubic yardage of "hard pan" for payment as "rock" on the first claim made by the contractor, he established a principle of additional compensation which was followed by the arbitrators.

May I deal with the general principles which are applicable to the setting aside of an award of an arbitrator?

In 1 Halsbury's Laws of England, 2nd ed. 1931, at p. 677, para. 1132, it is stated:

"The grounds on which an award may be set aside are the following:

"(1) That the arbitration or award has been improperly procured, as, for example, where the arbitrator is deceived, or material evidence is fraudulently concealed;

"(2) That the arbitrator or umpire has misconducted himself."

In the present case there is no suggestion or finding bringing the award within the first of these two categories. The only finding of the judge is that the arbitrators proceeded on the wrong principle or on a wrong basis.

The misconduct referred to in the second category mentioned in Halsbury above is defined by para. 1133 of the same volume. Of those cases so mentioned in para. 1133 only two could possibly fall within the finding of the learned judge, namely, misconduct occurs if the award "is on its face erroneous in matter of law; or even if there is some mistake of fact—but in such case the mistake must be either admitted or at least clear beyond any reasonable doubt".

An error in law on the face of the award, in order to be a ground for setting aside the award, must be such that there can be found in the award or a document actually incorporated therewith some legal proposition which is the basis of the award and which is erroneous. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it to be set aside, and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the decision of the arbitrator cannot be set aside only because the Court would itself have come to a different conclusion.

In *Attorney-General for Manitoba v. Kelly et al.*, [1922] 1 A.C. 268 at 281, 62 D.L.R. 370, [1922] 1 W.W.R. 576, it is stated: "In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award. . . ."

In our own courts in the case of *Re Beaver Wood Fibre Co. Limited and American Forest Products Corporation* (1920), 47 O.L.R. 590 at 592, 54 D.L.R. 672, the matter was dealt with by the Court of Appeal, the judgment being delivered by Meredith C.J.O., who stated: "On the question of setting aside the award, it is elementary that where the parties have chosen to constitute a court for themselves that court is a court to determine both the law and the facts, and if there is no misconduct on the part of the arbitrators, however much they may have erred either as to the law or the facts, the Court has no

jurisdiction to interfere. The only exception to that rule that I know of is where the error appears on the face of the award or is shewn by some document incorporated with it."

Probably the best exposition of the law with reference to the duty of the Court in setting aside or refusing to set aside an award of arbitrators is to be found in the oft-cited case of *Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company, Limited*, [1923] A.C. 480. In this case the Judicial Committee of the Privy Council reviewed the law in question. The High Court at Bombay had set aside an award, holding that it was bad on its face. The judgment of the Judicial Committee was delivered by Lord Dunedin who, at p. 486, stated as follows:

"The law on the subject has never been more clearly stated than by Williams J. in the case of *Hodgkinson v. Fernie*, 3 C.B. (N.S.) 189, 202 [140 E.R. 712]: 'The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. . . . The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.' This view has been adhered to in many subsequent cases, and in particular in the House of Lords in *British Westinghouse Co. v. Underground Electric Rys. Co.*, [1912] A.C. 673."

Later in the same judgment, at pp. 487-8, Lord Dunedin continued thus: "Now the regret expressed by Williams J. in *Hodgkinson v. Fernie* has been repeated by more than one learned judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto . . . some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a



contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: 'inasmuch as the arbitrators awarded so-and-so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting r. 52.' But they were entitled to give their own interpretation to r. 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound."

Approaching my consideration of the argument on this appeal in the light of this well-established law and in the light of the bare statement contained in the reasons appealed from, I am unable to find that the learned judge appealed from has proceeded upon these well-established principles. He has failed, in my opinion, to find, on the face of the award, that the arbitrators have tied themselves to any special legal proposition which, on examination, appears to be unsound.

I therefore think that this appeal should be allowed and the judgment below vacated. The award will stand, the costs of this appeal and of the motion below to be costs to the appellant.

*Appeal allowed with costs.*

*Solicitors for Bailey Construction Company, appellant: Bench, Keogh, Rogers & Grass, St. Catharines.*

*Solicitors for the Township of Etobicoke, respondent: McMaster, Montgomery & Co., Toronto.*

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[CHEVRIER J.]

**Humenick v. The City of Toronto.**

*Municipal Corporations—Liability for Ice and Snow on Sidewalks—  
“Gross negligence”—The Municipal Act, R.S.O. 1937, c. 266, s. 480(3).*

The plaintiff fell at a place where ice and snow had accumulated on a sidewalk. It was found: that there had been a layer of snow two or three inches thick, which had been allowed to remain for two days and which, as the result of climatic changes, had softened and then frozen, and had become even more slippery on the day of the accident by reason of the formation of water on the top; that the sidewalk had been in a dangerous condition for two days, and there was no evidence that sand, ashes, salt or any other substance had been spread; that the condition should have been known to the defendant municipality, through one of its employees, and that the defendant had had ample time, during the two days before the plaintiff's accident, to have the snow and ice removed or adequately covered, but had done nothing.

*Held*, this conduct by the municipality constituted gross negligence within the meaning of s. 480(3) of The Municipal Act, and the plaintiff was accordingly entitled to damages.

The definition of “gross negligence” in *Leeson v. The Village of Havelock*, [1940] O.R. 331, is to be preferred to that given by the same Court in *Harper v. The Town of Prescott*, [1939] O.W.N. 492, affirmed [1940] S.C.R. 688.

AN ACTION for damages for physical injuries.

1st and 2nd November 1948. The action was tried by CHEVRIER J. without a jury at Toronto.

*J. F. McGarry, K.C.*, and *M. Simon*, for the plaintiff.

*F. A. A. Campbell, K.C.*, for the defendant.

7th April 1949. CHEVRIER J.:—*I. The Pleadings.* On the 15th January 1947, at about 4.40 p.m., the plaintiff was walking southerly, on the sidewalk, on the west side of Dundas Street, in the vicinity of street premises no. 2665 Dundas Street, when, he says, due to the presence of ice and snow on the sidewalk, he slipped and fell on to said sidewalk, and, as a result of such fall, he suffered a broken right leg, severe shock, and other, minor, injuries.

He was confined to the hospital from 15th January to 24th February 1947, and again from the 11th April to the 1st May 1947. He did not start to work until 27th October, alleging that up to the 15th October 1947 he was unable to walk properly.

He seeks to recover damages in the sum of \$1,980.70 and general damages in the sum of \$10,000 and his costs.

He alleges that the injuries sustained by him were due to the gross negligence of the defendant, in that it failed to maintain the said sidewalk in a reasonably fit condition for use by the

public; that it failed to remove the ice from the area in question; that it was grossly negligent in permitting snow and ice to accumulate, particularly at the spot in question, which was near a street-car stop, where it was constantly used by pedestrians; that it did not take the necessary precautions to make the walk safe, by sanding or placing some chemical thereon; that it gave the plaintiff no warning of the condition of said sidewalk, nor did it make proper inspection of the said sidewalk.

*II. The Law.* To succeed in his claim, the plaintiff must establish that the faulty condition of the sidewalk which he alleges was due to the gross negligence of the corporation. That is covered by s. 480(3) of The Municipal Act, R.S.O. 1937, c. 266, which reads as follows: "Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk." What therefore is meant by gross negligence?

The term "gross negligence" is also used in an action involving an alleged criminal action. This is a simple civil action, in which the essence is not a criminal intent, but a simple want of taking care—a breach of duty to take care.

Subs. 1 of the same section, s. 480, reads in part as follows: "Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it . . . and in case of default the corporation shall subject to the provisions of *The Negligence Act*, be liable. . . ." I therefore take it that the nature of the gross negligence in the present action is one of the kind, nature and standard that applies in a purely civil action.

In Clerk & Lindsell on Torts, 10th ed. 1947, it is said at p. 345: "It is in each case practically a question of fact for the jury whether the proper degree of care has been taken." And at p. 349: "The existence of a duty to take care provides the really difficult problem of the tort of negligence. As the subject has grown up over a long period and without initial definition, it is practically impossible to be scientifically accurate, more particularly because the existence of a duty has been frequently confused with the degree of care. . . . An act may constitute negligence in law only provided that the other element of damage to a person to whom a duty of care is owed exist. Even if this duty is established, it remains a question of fact for the jury and not a question of law for the Judge."



In Beven's *Negligence in Law*, 4th ed. 1928, p. 25, it is said: "Now it is beyond question that the term 'gross negligence' has been used by many Judges—as, for instance, by Lord Chelmsford in *Moffatt v. Bateman* (1869), L.R. 3 P.C. 115, 122. But there he uses it merely as a convenient colloquialism; for he speaks of 'gross negligence—a term which is sufficiently descriptive of the degree of negligence which renders a person performing a gratuitous service for another responsible.' Such use of the term is analogous to the use by other Judges of the term 'degrees of negligence'—as, for instance, by Lindley, L.J., in *Cornish v. Accident Insurance Co.* (1889), 24 Q.B.D. 453, 457—where when he says 'but there are degrees of negligence' he clearly does not intend to assert that negligence is divisible into 'ordinary,' 'slight,' and 'gross,' but intends merely to point out that there are—as there obviously are—degrees in the 'absence of care according to the circumstances' which constitutes negligence (see *per* Montague Smith, J., in *Grill v. General Iron Screw Collier Co.* (1886), 35 L.J.C.P. 321, at p. 331), and in many cases the Judges have refused to recognize any distinction in law between 'negligence' and 'gross negligence,' and have, as will be seen, used the two terms as practically interchangeable."

Salmond's *Law of Torts*, 10th ed. 1945, pp. 29-30, says: "The careless man is he who does not care—who is not anxious or not sufficiently anxious, that his activities shall not be the cause of loss to others. The wilful wrongdoer is he who desires to do harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind. He who causes a result intentionally cannot also have caused it negligently, and *vice versa*."

Turning now to decided cases, the expression "gross negligence" has long and often been subject to the crucible of legal interpretation. Strange to say that the result has been unexpected; instead of coming out as a clear chemical compound, it has come out merely as a mechanical one, with its resultant properties none too clearly defined.

In 1896 was decided the case of *The City of Kingston v. Drennan*, 27 S.C.R. 46. The relevant part of the section of The Municipal Act was then in these words (1892, 55 Vict. c. 42, s. 531, amended by 1894, c. 57, s. 13): "... no munic-

ipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice upon the sidewalks, unless in case of gross negligence by the corporation. . . .”

Sedgewick J., for the majority of the Court, said, at p. 55: “The obligation of the city was to keep the streets and sidewalks in a reasonable state of repair—in such a condition that the traveller using them with ordinary care might do so with safety.” Again, at p. 60:

“I am not bold enough to enter upon a detailed investigation as to the difference between gross and other kinds of negligence. That question has been discussed by civilians and text-book writers to such an extent that judges have been found to say that there are no degrees of negligence. However this may be we must, I suppose, give some meaning to this expression of the legislative will and the meaning I give to it is ‘very great negligence.’ The jury have found that species of negligence in this concrete case. The trial judge did not attempt, as I do not, to define. He merely put to the jury the contentions of fact and the supporting evidence stating that if these contentions were true there was gross negligence present here. That I think was the proper course and the jury’s finding should not be disturbed on that ground.”

In *German v. The City of Ottawa* (1917), 56 S.C.R. 80 at 89, 39 D.L.R. 669, Anglin J. said: “Whether the failure of the city employees to prevent that condition arising, or to remove it before 9 a.m. on Wednesday the 2nd of February amounted to ‘gross negligence’ (defined by this court as ‘very great negligence’; *Kingston v. Drennan*, 27 S.C.R. 46, at page 60); which is the statutory condition of the defendants’ liability . . . is, therefore, the vital question involved in this appeal. Its solution must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it.”

In *Holland v. The City of Toronto*, 59 O.L.R. at 631, [1927] S.C.R. 242, [1927] 1 D.L.R. 99, Anglin C.J.C. said at pp. 634, 637:

“ . . . the question whether or not the circumstances in evidence establish a case of ‘gross negligence’ is undoubtedly one of fact, to be determined in each case as it arises.

"The term 'gross negligence' in this statute is not susceptible of definition. No *a priori* standard can be set up for determining when negligence should be deemed 'very great negligence'—a paraphrase suggested in [*The City of Kingston v. Drennan, supra*], which for lack of anything better has been generally accepted. The circumstances giving rise to the duty to remove a dangerous condition, including the notice, actual or imputable, of its existence, and the extent of the risk which it creates—the character and the duration of the neglect to fulfil that duty, including the comparative ease or difficulty of discharging it—these elements must vary in infinite degree; and they seem to be important, if not vital, factors in determining whether the fault (if any) attributable to the municipal corporation is so much more than merely ordinary neglect that it should be held to be very great, or gross, negligence.

"There was, in our opinion . . . such 'very great negligence' that to hold it to be less than 'gross' would be to encourage a reckless indifference on the part of municipal authorities to the safety of persons lawfully using the streets, and would, in effect, be to declare that municipal corporations in Ontario are immune from liability for personal injury caused by accidents due to snow and ice on sidewalks."

In *Huycke v. The Town of Cobourg*, [1937] O.R. 682, [1937] 3 D.L.R. 720, Fisher J.A. said at p. 690:

"The law is well-settled that if a municipality permits a slippery, icy sidewalk in a thickly peopled part of the municipality to remain unprotected or ignores it altogether, and some one is injured, that would constitute gross negligence. . . .

"The object of the Legislature in passing the enactment that gross negligence must be proved, was, I think, to confine the liability of a municipality to cases where the municipality was guilty of a flagrant or gross breach of its ordinary duty—and not an extraordinary duty—to keep its sidewalks reasonably safe for pedestrians using them."

I think this is the first time that a second epithet has been added to the words "gross negligence"—up to this moment the words used were "gross negligence". The word "flagrant" is added for the first time.

It is extremely important to remember that this judgment of the Court of Appeal speaks of the defendant's duty as "its



ordinary duty—and not an extraordinary duty”, because of the words to be later used in the next case by the same Court.

In *Harper v. The Town of Prescott*, [1939] O.W.N. 492, [1939] 4 D.L.R. 453, the Court was composed of Riddell, McTague and Gillanders JJ.A. McTague J.A. delivered the judgment of the majority of the Court—Gillanders J.A. simply concurred and Riddell J.A. dissented. McTague J.A. used these words: “When it comes to applying the principle, in general what a plaintiff has to prove under our statute is that there was a breach of the duty to keep the sidewalk reasonably safe for pedestrians using same reasonably, and that the breach of that duty approaches the wilful, the reckless, the wanton; the breach must be flagrant. Mere proof of negligence in the breach is not sufficient.”

On appeal to the Supreme Court of Canada, [1940] S.C.R. 688, [1940] 4 D.L.R. 225, the decision was upheld by a 3 to 2 decision. A careful reading of that decision leads me to conclude that the decision was upheld on the facts, rather than on the definition as given by the Court *a quo*. But of far greater interest is the fact that the judgment of the Supreme Court of Canada makes no reference to the standard of negligence set up by the Court of Appeal’s definition of gross negligence, as set out in the case under review;

The following excerpts from the dissenting judgment of Crocket J. at pp. 691, 694, are perhaps worthy of consideration:

“There have been several judgments in this Court and in the Ontario courts dealing with the meaning of ‘gross negligence’ as used in this enactment. Not one of those judgments has ever ventured to suggest that the enactment requires the proof of either ‘wilful,’ ‘reckless,’ ‘wanton,’ or ‘flagrant’ negligence as necessary to fix a municipal corporation with liability for personal injury caused by snow or ice upon a sidewalk. . . .

“It is clear, I think, that the decisions and dicta to which I have referred, far from lending any support to, actually negative the premise upon which the majority judgment in the Appeal Court is based, viz.: that there must be proof of negligence measurable by the standard of that prescribed by the Criminal Law before there can be any recovery against the municipality under the provisions of the *Municipal Act*.”

In 1939, in *Harper v. The Town of Prescott*, *supra*, Gillanders J.A. had concurred in the Court’s majority decision. But in

*Leeson v. The Village of Havelock*, [1940] O.R. 331 at 343, [1940] 3 D.L.R. 665, affirmed [1940] 4 D.L.R. 791, he accepts the following standard set by Street J. in an unreported case of *McLean v. Ottawa*, 4th October 1899, referred to in Denton's *Municipal Negligence* at p. 156: "The sense I place upon it as here used is that the corporation are not to be liable unless they have not only failed fully to perform the duty of keeping the street reasonably safe for travel, but have been guilty of a gross, or very great negligence in the performance of that duty."

It is again to be noted that, though the Court of Appeal's judgment in the *Harper* case is dated 28th September 1939, yet in its judgment in the *Leeson* case, dated 17th June 1940, no reference is made to the *Harper* case. Gillanders J.A., for the Court, in the *Leeson* case at pp. 343-4 expresses himself thus, as to whether the defendant's conduct constituted gross negligence:

"Keeping in mind that the adjective 'gross' is not 'devoid of meaning' and that the negligence to establish liability should be at least 'great', per Osler J.A. in *Ince v. Toronto* (1900), 27 O.A.R. 414, or as said in *Kingston v. Drennan* (1897), 27 S.C.R. 46, 'very great', I cannot think it does."

This appeal was heard by the same Court which had heard the *Harper* appeal, and I take that to be of primary importance, in endeavouring to determine what standard of gross negligence is being set up as the proper one.

Now it is interesting to note that Riddell J.A., who had dissented in the *Harper* case, agreed in the *Leeson* case with Gillanders J.A., and that McTague J.A. also agreed, though there is no comparison between the standard of negligence set out in the *Harper* case and the one set out in the *Leeson* case. The headnote to this case in the Court of Appeal uses the above-quoted words as the *ratio decidendi* of the judgment of the Court of Appeal. Perhaps this is a case where the maxim *leges posteriores priores contrarias abrogant* might apply *mutatis mutandis*.

In *Berthiaume et al. v. The City of Ottawa*, [1946] O.R. 788, [1946] 4 D.L.R. 770, the judgment of the Court was delivered by Hogg J.A., who said, at p. 793: "I think it must be taken that the proposition stated by the Court of Appeal in the *Huycke* case and in the *Harper* case—the judgment in the *Harper* case being affirmed by the Supreme Court of Canada—is the law with

respect to the meaning of the phrase 'gross negligence' in that section of The Municipal Act with which we are now concerned."

Again it may be pointed out that although the Supreme Court of Canada dismissed the appeal in the *Harper* case, it did not in so many words accept the definition of gross negligence as set out in the *Harper* case, but made its own observations on the nature of the negligence required, and, it is logical to assume, pronounced judgment on that standard.

Is the standard of gross negligence required to establish the responsibility of a municipal corporation in a civil action the same as the standard required in an action for criminal negligence, arising out of the killing of a human being by an automobile on the highway? (cf. Crocket J. in *Harper v. The Town of Prescott*, *supra*.) Is it possible for a municipal corporation to perform, as such, a "wilful" act amounting to a crime?

The corporation can only act through, and be responsible (in a proper case) for the negligence of, its servants.

If a tram-car operator "wilfully" runs over a pedestrian, is the company, owner of the tram-car, responsible for his wilful act, amounting perhaps to manslaughter or to murder?

If that is to be the standard of negligence to be established by a plaintiff, in order to be able to recover damages in such case against a municipal corporation, is it not tantamount to saying that in no case can a municipal corporation be liable for such damages? Surely that is not the standard of negligence to be established against a municipal corporation, nor that contemplated by the Legislature, or, at all events, expressed in The Municipal Act. If it must be a wilful negligence, then obviously there must be intent. Intent on the part of whom? How, in the first place, can there be wilful negligence? In my opinion and understanding, the two terms are contradictory. I cannot put it more clearly than by again repeating the quotation from Salmond on Torts, *supra*: "Negligence and wrongful intent are inconsistent and mutually exclusive states of mind."

I am not unmindful of the doctrine of *stare decisis*, and the jurisdictions by which I am bound. In view of what I have expressed above, and in view of the decisions in the *Harper* and *Leeson* cases, I prefer to be bound by the definition of gross negligence given in the latter case, which, in my opinion, is more in harmony with the decisions of the Supreme Court of Canada.



In the light of the definition of gross negligence, and of its component elements, as set out in the judgment of Anglin C.J.C. in *Holland v. The City of Toronto*, *supra*, I proceed to find the facts, as to (a) whether there was gross negligence or not on the part of the defendant corporation; (b) the nature of the plaintiff's injuries; (c) the damages thereby suffered.

*III. As to Damages.* I accept the evidence of (1) the plaintiff (a) as to the condition of the walk at 4.30 p.m. or so, when he slipped thereon; (b) as to the nature and extent of his injuries; (2) Dr. Galoway, as to the nature and extent of the injuries.

From that evidence, I find that, as the result of the fall as aforesaid, the plaintiff suffered the fracture, in two places, of the right femur—that as the result of that fracture he was not fit to resume work until October; that there has been quite a satisfactory result from the operation and treatment; that he suffered considerable pain for some time after the accident, but that it gradually eased off; that he endured great discomfort during the use of crutches, and until he was finally able to get around without the use of a cane; that there may be some possibility of further discomfort, if the screws holding the fractured parts together get loose, but there is no great probability of that happening.

His out-of-pocket expenses I fix at \$720. I fix his loss of work as the result of this accident at eight and a half months. His earnings, which I fix at \$30 a week for some 40 weeks, would be \$1,200. Compensation for pain, suffering, discomfort, etc., and future disability I fix at \$1,100. I, therefore, assess his damages at the sum of \$3,020.

*IV. As to the facts.* In *Holland v. The City of Toronto*, *supra*, Anglin C.J.C. at p. 634 (O.L.R.) says: "The circumstances giving rise to the duty to remove a dangerous condition, including the notice, actual or imputable, of its existence, and the extent of the risk which it creates—the character and the duration of the neglect to fulfil that duty, including the comparative ease or difficulty of discharging it . . . seem to be important, if not vital, factors in determining whether the fault (if any) attributable to the municipal corporation is so much more than merely ordinary neglect that it should be held to be very great, or gross, negligence."

And at p. 637, Anglin C.J.C. says: "There was, in our opinion, on the part of Blackburn, the city sectionman, such 'very great negligence' that to hold it to be less than 'gross' would be to encourage a reckless indifference on the part of municipal authorities to the safety of persons lawfully using the streets and would, in effect, be to declare that municipal corporations in Ontario are immune from liability for personal injury caused by accidents due to snow and ice on sidewalks. We agree with Mr. Justice Riddell— 'on any definition of gross negligence' we are unable to see that Blackburn's conduct 'does not come within the words' ".

At p. 633, he says: "Riddell, J.A. [who dissented in the Court of Appeal] . . . said:—'It is hard to conceive of a more dangerous state of a sidewalk. . . . The plain fact seems to be that, if we accept his evidence, the city's servant' (Blackburn) 'who is responsible for the proper cleaning of the sidewalks at the point in question sees on Thursday morning a state of affairs which is in fact very dangerous, but, because in his opinion it was no more dangerous than in any other place, he takes his chances, leaves the condition unchanged, and what he ought to have foreseen happened. On any definition of "gross negligence" I am unable to see that this does not come within the words.' "

At p. 632, Anglin C.J.C. says: " . . . the learned Judge refers to the fact that Blackburn, a city sectionman, had patrolled the street on Thursday morning, and, although he noticed snow on the sidewalk, had observed nothing that he regarded as dangerous. It should, perhaps, be here observed that this same sectionman examining the sidewalk on the Friday [the accident happened on Friday at 9.30 a.m.], after the accident, found 'no accumulation of dangerous ice, not to my estimation. There might have been a little ice under the snow, but there was nothing that I could see dangerous.'

"He also says that the condition on Friday was the same as on Thursday."

Quoting Latchford C.J., Anglin C.J.C. continues: "There was undoubtedly evidence on the part of the plaintiff, his family and his friends, on which, if credited, a finding of gross negligence might properly have been based. . . . He (the trial Judge) did not, indeed, expressly discredit the plaintiff, his family and friends, who swore to a state of facts establishing gross or

actionable negligence; but it is a necessary implication from his judgment dismissing the action that he gave their evidence no credit and that he accepted evidence which contradicted them."

At p. 637, Anglin C.J.C. says: "The highly dangerous condition of the sidewalk from Wednesday to Friday was fully proven. The risk of accident, having regard to the relatively heavy pedestrian traffic, was great. An intelligent person observing the conditions with any reasonable degree of care on the Thursday should have realized the risk of leaving the sidewalk uncleaned and unsanded. The duty of the city section-man was simple and easy — merely to give notice to the occupant to clear off the snow and ice or to sprinkle sand or ashes over it."

There is a remarkable similarity of facts and circumstances between that case and the one under review.

[His Lordship here reviewed the evidence in detail, including that of one Ellison, a patrolman, and proceeded as follows:]

*V. Conclusions.* On the evidence, I therefore find as facts:

(1) That the sidewalk where the plaintiff fell and "from back of the club house [shown on ex. 5] up to the corner" was covered with a layer of snow two or three inches thick.

(2) That that snow had been allowed to remain there for some time previously, two days.

(3) That as the result of climatic changes during that period of time, snow had been softened, had been made slushy, and had been left to freeze into a rough, uneven, slippery surface.

(4) That it had been in that condition from early morning of the 15th and was still in that condition at 4.30 p.m., except that because of the higher temperature of the day, it had become somewhat wet on the surface, which made it more slippery.

(5) That there is no evidence that at any time sand, ashes, salt or any other substance had been spread over that surface.

(6) That for some two days previously, and from early morning of the 15th to at least 4.30 p.m., the sidewalk in the area described was in a dangerous condition for pedestrians using it, because of the ice and snow thereon in the condition described.

(7) That prior to the morning of the 15th Ellison had been past the premises of the Kiwanis Club, shown on the plan, ex. 5, "once every two or three days".



(8) That said condition should have been known to the corporation, through its servant, at least from the morning of the 15th.

(9) That nothing was done by the said corporation, or by Ellison, to make safe said dangerous condition.

(10) That the said corporation had had ample time, during the days that the condition existed, to have caused to be removed from said sidewalk the said ice and snow, or covered it adequately with sand, ashes or other protective substance.

(11) That it was negligence on the part of the said corporation to have left said walk in said condition, for said period of time, and more particularly as on the day of 15th March.

(12) That said negligence, under the circumstances shown in evidence, was "very great", amounting to gross negligence, within the meaning of *Holland v. The City of Toronto, supra*; was a flagrant or gross breach of its ordinary duty, within the meaning of *Huycke v. The Town of Cobourg, supra*; "gross or very great negligence", within the meaning of *Leeson v. The Village of Havelock, supra*.

(13) That such gross negligence is gross negligence within the meaning of subs. 3 of s. 480 of The Municipal Act.

The plaintiff's action is therefore well founded in law, and there will be judgment for the plaintiff for the sum of \$3,020 and his costs.

*Judgment accordingly.*

*Solicitor for the plaintiff: Morris Simon, Toronto.*

*Solicitor for the defendant: W. G. Angus, Toronto.*

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## [COURT OF APPEAL.]

**Davey and Donnelly v. McManus Petroleum Limited et al.**

*Damages—Assessment by Jury—Review on Appeal—Court of Appeal not Entitled, without Consent of Both Parties, to Substitute its own Assessment—Necessity for New Assessment by Jury.*

An award of damages by a jury will be set aside if it is plain that the jury either misunderstood or disregarded their duty in assessing the damages, or took into consideration matters that should not be considered. *Praed v. Graham* (1889), 24 Q.B.D. 53; *Warren v. Gray Goose Stage Limited*, [1938] S.C.R. 52, and other authorities, applied. Where this is done the Court of Appeal should not itself fix the proper damages, unless both parties consent, but should order a new assessment by a jury. *Watt v. Watt*, [1905] A.C. 115, applied; *Piper v. Hill* (1922), 53 O.L.R. 233, disapproved.

AN APPEAL by the defendants from part of the judgment of Wells J., entered on the findings of a jury.

The action arose out of an automobile accident in which the plaintiff Donnelly, who was riding as a passenger in an automobile owned and driven by the plaintiff Davey, was injured. After the filing of their defences the defendants admitted liability, and paid a sum of money into court in full satisfaction of the damages of both plaintiffs. Davey accepted the sum paid in for his damages, but Mrs. Donnelly declined to do so, and the trial proceeded solely as an assessment of her damages.

12th April 1949. The appeal was heard by ROBERTSON C.J.O. and ROACH and HOGG JJ.A.

*T. N. Phelan, K.C.*, for the defendants, appellants: We are concerned only with the award of \$10,000 as general damages to the plaintiff Donnelly, which is out of all proportion to the injuries sustained by her. She had a pre-existing arthritic condition, and high blood pressure, and was in hospital, as a result of the accident, for 9 or 10 days. There remained a painful condition in her hand, but she was unemployed at the time of the accident, probably because of the high blood pressure. The award is so large as to shock the conscience of the Court, and to indicate that the jury must have applied a wrong principle: *Deutch et al. v. Martin*, [1943] S.C.R. 366 at 368, [1943] 3 D.L.R. 305.

In the *Deutch* case a new assessment by a jury was ordered, but this is not necessary. This Court has power itself to fix the damages at a proper amount, under s. 26(1) and (2) of The Judicature Act, R.S.O. 1937, c. 100. If the Court is satisfied that no jury could reasonably award \$10,000, it should itself fix them

at a proper amount. All the facts are before the Court: *Brody v. The Dominion Life Assurance Company*, [1928] S.C.R. 582, [1928] 4 D.L.R. 529; *Canada Rice Mills, Limited v. Union Marine and General Insurance Company, Limited*, [1941] A.C. 55 at 65, [1940] 4 All E.R. 169, [1941] 1 D.L.R. 1, 8 I.L.R. 1, [1941] 3 W.W.R. 401; *Piper v. Hill*, 53 O.L.R. 233, [1923] 4 D.L.R. 1175; *Selick v. New York Life Insurance Co.* (1920), 48 O.L.R. 416 at 427, 57 D.L.R. 222; *Kostuk v. National Ben Franklin Fire Insurance Co.*, 60 O.L.R. 56, [1927] 1 D.L.R. 1145.

*G. L. Mitchell, K.C.*, for the plaintiff Donnelly, respondent: It was the defendants who required that the damages should be assessed by a jury, and they should not now be heard to complain of the assessment. The jury may have considered the shrunken value of money in assessing the damages: *Donoghue v. Magee et al.*, [1949] 1 W.W.R. 70 at 73. The worst that can be said is that the jury may have been generous, but that is not enough. This Court will not interfere unless it can be said that the award shocks the judicial conscience: *Wiksech v. General News Company and Leith*, [1948] O.R. 105, [1948] 1 D.L.R. 753; *Warren v. Gray Goose Stage Limited*, [1938] S.C.R. 52, [1938] 1 D.L.R. 104; *Mechanical and General Inventions Company, Limited et al. v. Austin et al.*, [1935] A.C. 346; *Praed v. Graham* (1889), 24 Q.B.D. 53; *McCannell v. McLean*, [1937] S.C.R. 341, [1937] 2 D.L.R. 639.

The respondent's injuries were serious. The index finger of one hand is permanently stiff, and her evidence was that there had never been any indication of the arthritis before the accident. If the condition was latent, and was made active by the accident, it is to be taken into consideration. She is still troubled in one knee, and at the date of the trial she was still receiving treatment. It cannot be said that the award shocks the conscience of the Court.

*T. N. Phelan, K.C.*, in reply.

*Cur. adv. vult.*

28th April 1949. ROBERTSON C.J.O.:—This is an appeal by the defendants in the action from the judgment of Mr. Justice Wells, dated 31st January 1949, at the trial of the action before him with a jury at Windsor.

By agreement between the parties the question of liability — was settled, and all that remained to be determined by the jury



was the amount of damages to be awarded the plaintiff Donnelly in respect of the injuries she had sustained in the motor car accident from which the action arose.

The jury assessed the damages of the plaintiff Mrs. Donnelly at \$10,937.42. In my opinion the evidence does not support that finding, and the jury must have taken into consideration matters that they ought not to have considered. The amount awarded is, in my opinion, definitely beyond such a sum as a reasonable jury could properly allow upon the evidence, and the verdict should not be allowed to stand.

The only problem that the appeal has presented that required that we should take time to consider our judgment, arose from the submission of appellants' counsel that we should ourselves undertake to fix the amount of damages to be awarded the plaintiff, rather than send the case back for a reassessment of damages by a jury. He particularly relied upon *Piper v. Hill*, 53 O.L.R. 233, [1923] 4 D.L.R. 1175, where the Appellate Division adopted the course that we are urged to take in the present case. In my opinion that decision is not in line with the general current of decisions since the decision of the House of Lords in *Watt v. Watt*, [1905] A.C. 115. The headnote in the last-mentioned case is as follows:

"When in an action of tort the jury find a verdict for the plaintiff for a sum which the Court of Appeal considers unreasonable and excessive that Court has no jurisdiction, without the defendant's consent, to order that unless the plaintiff consents to reduce the damages there shall be a new trial."

Equally, the Court of Appeal has no right to deprive the plaintiff, without his consent, of the right to have the damages assessed by a jury, instead of by the Court of Appeal. Reference may be made to *Warren v. Gray Goose Stage Limited*, [1938] S.C.R. 52, [1938] 1 D.L.R. 104; *Ronson v. Canadian Pacific R.W. Co.* (1909), 18 O.L.R. 337, 9 C.R.C. 361; *London and Western Trusts Co. v. Grand Trunk R.W. Co.* (1910), 22 O.L.R. 262; *Doan v. Neff* (1916), 38 O.L.R. 216; *Klein v. Jenoves and Varley*, [1932] O.R. 504, [1932] 3 D.L.R. 571; *Keeley v. Evans* (1932), 41 O.W.N. 180; *Wing Lee v. Lew*, [1925] A.C. 819, [1925] 3 D.L.R. 1009, [1925] 3 W.W.R. 49.

The practice laid down in *Watt v. Watt*, *supra*, and generally followed here since that decision, has become too well estab-

lished to be departed from. In special circumstances, such as in the case last cited, and in such cases as *Wright v. Toronto R.W. Co.* (1910), 20 O.L.R. 498, and *Lionel Barber and Company, Limited v. Deutsche Bank (Berlin) London Agency*, [1919] A.C. 305, the principle of *Watt v. Watt* did not apply.

The appeal should be allowed. The assessment of damages to the respondent should be set aside, and there should be a new trial limited to the assessment of damages proper to be allowed to the respondent. The appellants are entitled to their costs of appeal. The costs of the former trial and of the new assessment of damages will be in the discretion of the judge before whom the new trial is held.

ROACH J.A.: I have had the benefit of reading the reasons of my Lord Chief Justice and my brother Hogg. I agree with both and have nothing to add.

HOGG J.A.:—This is an appeal by the defendants with respect only to the amount of damages assessed to the respondent Mrs. Vonnice M. Donnelly, at the trial of the action brought by the respondent and Frank P. Davey against the appellants for injuries and damages suffered, arising out of a motor car accident.

The action was tried before Mr. Justice Wells, with a jury, on the 31st January 1949, and damages were awarded to the respondent Mrs. Donnelly in the sum of \$937.42 as special damages and \$10,000 as general damages.

The respondent is a widow, 55 years of age, residing in the city of Detroit in the United States of America for part of the time, and at her summer cottage at Kingsville, Ontario, for some six months of the year. At one time the respondent followed the occupation of an interior decorator, but she had not been engaged in such work for about a year before the accident.

The injuries suffered by the respondent, as appears by the evidence given at the trial of the action by the physicians who attended upon her, were: a fracture of two ribs on the right side; a fracture and dislocation of the first finger of the right hand; a fracture of the little toe of the left foot; the knees were bruised and the skin scraped thereon; a few cuts, particularly around the nose, and shock from the aforesaid injuries. Mrs. Donnelly was confined to the hospital for ten days, and was in bed at her home at Kingsville for the two weeks following the

time she spent in the hospital. Several months after the accident happened an operation was performed on her right hand, which had become swollen and painful, and a blood-clot was removed therefrom.

The mishap occurred on 10th May 1948, and at the date of the trial it was found that the first finger of the respondent's right hand had become permanently stiff. The other fingers of that hand have not their full range of movement. According to the physicians, her hand cannot be used for ordinary household duties.

Dr. Trottier, who gave evidence on behalf of the respondent, said that at the time of the trial she had no disability which was really severe. The appellants contend that the amount of \$10,000 awarded as general damages to the respondent by the jury is excessive, and that the award of so large an amount is not supported by the evidence.

The ordinary rule as to the amount of damages to be allowed is that they should be what would be a fair and reasonable compensation for the injury sustained and the consequences that have followed such injury. Pain and suffering and probable permanent inefficiency and disability are factors to be considered, as well as the prospective loss which may be suffered by the injured person, in fixing the amount of damages to be awarded.

The rule to be followed in considering whether an award of damages by a jury is excessive in amount, is established by the following authorities:

In *Praed v. Graham* (1889), 24 Q.B.D. 53, Lord Esher M.R. said at p. 55, in discussing an application to set aside a verdict of a jury on the ground that the damages awarded were excessive:

"I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only:—'We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them', then they ought not to interfere with the verdict. If, on the other hand, the Court thinks that, having regard to all the



circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict."

The question involved in this appeal was considered in two cases in the Court of Appeal in 1910.

Moss C.J.O. said in *London and Western Trusts Co. v. Grand Trunk R.W. Co.* (1910), 22 O.L.R. 262 at 264: "It then remained for the jury to ascertain and fix the value of the expectation of pecuniary benefit. But in exercising their functions in this respect the jury are not justified in going beyond what appears to be fair and reasonable, as against the defendants. It is not the province of juries nor are they privileged to be generous with other people's money. And it is the plain duty of the Court to see that an award of damages, in an action of this kind, which appears to have been arrived at upon considerations not warranted by the evidence, shall not stand. In such a case the Court may and should interpose a controlling hand in order to prevent what appears to be an injustice."

In *Sill v. Alexander* (1910), 2 O.W.N. 401, 17 O.W.R. 775, Middleton J. said at p. 776: "The Court will not hesitate to interfere if satisfied that the amount is so large, that no twelve men could have reasonably given it, or if satisfied that the jury must have taken into account matters which they ought not to have considered, or acted upon a wrong principle."

In *Mechanical and General Inventions Company, Limited et al. v. Austin et al.*, [1935] A.C. 346, Lord Wright said that the principles stated by Lord Esher in *Praed v. Graham* were to be applied when considering whether a verdict should be set aside on the ground that the damages were excessive.

It was said in *Warren v. Gray Goose Stage Limited*, [1938] S.C.R. 52, [1938] 1 D.L.R. 104, that the verdict of a jury as to damages ought to be set aside in any case in which the Court finds it clearly established that the jury have misunderstood or disregarded their duty, and the amount of damages awarded is, in law, indefensible.

I am of the opinion that the jury, in awarding \$10,000 general damages to the respondent, in view of all of the circumstances with respect to the injuries received by her, either misunderstood or disregarded their duty in awarding an amount larger than it was reasonable to give.

The nature of the relief that may be granted from an award by a jury of damages which are excessive in amount, is well established. A new trial by a jury may be ordered, confined to the reassessment of damages.

Mayne on Damages, 11th ed. 1946, p. 637, says: "The Court of Appeal will not in any case, where the action was tried with a jury, reduce the damages in lieu of ordering a new trial, without the consent of both plaintiff and defendant."

In the House of Lords this subject was considered in *Watt v. Watt*, [1905] A.C. 115. The Earl of Halsbury L.C. held that there was no jurisdiction in the Court of Appeal to fix the amount of damages without the consent not only of the plaintiff, but of both parties. Lord Davey was of the opinion that if the Court takes it upon itself to fix the amount of damages which a defendant is to pay "it is *primâ facie* usurping the functions of the jury and invading the right of the defendant", but the Court has jurisdiction to set aside the verdict of the jury and direct a new trial where it considers the damages excessive.

On this point see also *Doan v. Neff* (1916), 38 O.L.R. 216 at 220; *Keeley v. Evans* (1932), 41 O.W.N. 180; *Warren v. Gray Goose Stage Limited*, *supra*; *Canadian Pacific Express Company et al. v. Levy et al.*, [1945] S.C.R. 456, 58 C.R.T.C. 212, [1945] 3 D.L.R. 81; *Wiksech v. General News Company and Leith*, [1948] O.R. 105, [1948] 1 D.L.R. 753.

The conclusion I have reached with respect to this appeal is, that the amount awarded by the jury to the respondent is so excessive in its relation to the injuries sustained by her and the consequences which have followed, or may follow, such injuries, that there should be a new trial confined to the assessment of damages. I think the appellants should have the costs of the appeal. The costs of the former trial and of the new trial to be in the discretion of the judge presiding at the new trial.

*New trial ordered as to damages.*

*Solicitors for the plaintiff Donnelly, respondent: Mitchell & Thompson, London.*

*Solicitors for the defendants Silverwood Dairies Limited and Beduz, appellants: Ivey & Livermore, London.*

*Solicitors for the defendants McManus Petroleum Limited and Church, appellants: McTague, McKeon, Deziel & Clark. Windsor.*

[COURT OF APPEAL.]

**Re The Township of Proton and The Township of Egremont.**

*Municipal Corporations—Opening up of Roads—Road Allowance Forming Boundary-line between Two Townships—Disagreement as to Opening—How Disagreement to be Settled—Reference to County Council or Arbitration before County Judge—Proper Formalities to be Observed—Draft By-law—The Municipal Act, R.S.O. 1937, c. 266, ss. 490, 491.*

If s. 490 of The Municipal Act applies to a disagreement between two municipalities as to whether or not a road allowance forming the boundary-line between them shall be opened up (as to which see the next paragraph), it is not a sufficient compliance with subs. 1 of that section for the municipality which desires the work to be done to pass a by-law merely stating its desire and requesting the other municipality to pass a similar by-law. What the section requires is "a draft by-law for carrying into effect what it is desired shall be done", i.e., a by-law providing for the opening of the road, for its cost, and for its maintenance and repair after it is opened. Unless such a by-law is adopted, there is no foundation for subsequent proceedings by arbitration.

Per ROACH and HOGG JJ.A.: Section 490 does not apply to such a disagreement. The history of that section and of s. 491 shows that it is the latter section which is applicable in the event of such a disagreement. The dispute must therefore be settled by the county council, and there is no jurisdiction in the County Judge to arbitrate the matter under s. 490.

AN APPEAL by the Township of Proton from an award of Morley Co. Ct. J., of the County Court of the County of Grey, acting as an arbitrator under s. 490 of The Municipal Act, R.S.O. 1937, c. 266.

14th April 1949. The appeal was heard by ROBERTSON C.J.O. and ROACH and HOGG JJ.A.

*J. J. Robinette, K.C.*, for the appellant: The County Judge had no jurisdiction in this matter as official arbitrator under s. 356 of The Municipal Act, R.S.O. 1937, c. 266, since the matter should have been settled by the county council under s. 491. Section 490, under which the respondent purported to act, and which provides for arbitration, is inapplicable to this disagreement. This road allowance was not a "highway" within the meaning of s. 490, although admittedly s. 453 does provide that unopened road allowances are highways. There are many references to highways in the Act, and s. 453 cannot apply to all of them. We must decide whether this was a highway in fact or only in law. [ROBERTSON C.J.O.: There is no obligation to open the road allowance and until it is opened, and in public use, there is no obligation to repair.] No. "Highway" in s. 490 must mean a highway in fact. The distinction is indicated in *Hislop v.*



*The Township of McGillivray* (1888), 15 O.A.R. 687, affirmed (1890), 17 S.C.R. 479. [ROBERTSON C.J.O.: Section 490 was new in 1913, but s. 491 had been in the Act for a long time, and was amended. This might throw some light on the relationship between the two sections.] Section 491, in varying forms, has been in the Act ever since The Municipal Institutions Act, 1866 (Can.), c. 51: Biggar's Municipal Manual, 11th ed. 1900, p. 880.

Section 491 deals specifically with such a disagreement as occurred here, and would therefore supersede s. 490 with respect to it, even if s. 490 were wide enough in terms to cover it. There is an indication in s. 488 that arbitration proceedings do not apply to cases provided for in s. 491.

Even if s. 490 were held to apply here, the County Judge lacked jurisdiction because the respondent did not perform the conditions precedent to arbitration. It should have prepared a draft by-law, providing for the work and for the apportionment of costs. Instead, it merely passed a by-law of its own, expressing its wish that the work should be done. The arbitrator had no jurisdiction to go beyond the terms of the by-law; in particular, he had no jurisdiction to apportion the cost, since the by-law was silent as to that. Even if s. 490 is applicable generally, the matter of apportionment of cost is expressly dealt with in s. 491, which must be resorted to on that point.

*Wilfred Judson, K.C.*, for the respondent: This case is clearly within s. 490. That section applies wherever there is a disagreement as to a highway under the joint jurisdiction of two municipalities. Section 491 deals with a failure to agree as to the nature of the work to be done in connection with the opening, but not with a disagreement as to whether or not the road shall be opened at all. Section 491(2) deals with the case where both municipal councils neglect or refuse to open up a road allowance, but that is not this case, since the appellant's council clearly did not neglect or refuse. The points of disagreement dealt with in s. 491 are less fundamental. [ROBERTSON C.J.O.: Do you not think that subs. 2 of s. 491 is meant to be read with subs. 1?] Section 491 was enacted in its present form in The Municipal Act, 1913, c. 43, its predecessor, in The Consolidated Municipal Act, 1903, c. 19, having been not unlike the present subsection, but sufficiently so to support my contention. Section 490 was passed in 1913 to cover this precise situation, and also that dealt with in *Hislop v. The Township of McGillivray*, *supra*.

As to what constitutes a highway, s. 453 must be conclusive. [ROBERTSON C.J.O.: It must be read with the provisions of The Surveys Act, R.S.O. 1937, c. 232.] Looking to the definition in s. 453, and reading it into s. 490, it is clear that that section applies exactly to the situation that has arisen here. This road allowance is clearly under the jurisdiction of both municipalities under s. 460.

As to the conditions precedent, the by-law which was passed may be treated as a draft. It shows the matter in dispute, and what it is desired shall be done. It is true that it does not refer to costs, but under s. 490 the whole "matter" is to be arbitrated, and that term is sufficiently wide to entitle the arbitrator to apportion the cost.

If there is doubt as to which section is applicable, that doubt should be resolved in such a way as to uphold the proceedings.

*J. J. Robinette, K.C.*, in reply.

*Cur adv. vult.*

2nd May 1949. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment of Mr. Justice Roach upon this appeal. I agree that the appeal must be allowed, with costs. It is quite clear that even if it were conceded that s. 490 of The Municipal Act, R.S.O. 1937, c. 266, is the section under which the respondent municipality should proceed, the proceedings taken by the respondent were not in accordance with that section. The by-law prepared was not in accordance with the requirements of s. 490, so that, in their very initiation, the proceedings were fatally defective.

I have, however, been much troubled over the question whether s. 490 or s. 491 is the section under which the respondent's council should proceed to open the highway constituting a township boundary-line, over which the appellant and the respondent have joint jurisdiction. There were a good many changes of some importance in the sections of The Municipal Act as it was revised and re-enacted in 1913 by c. 43 of the statutes of that year. It was at that time that what is now s. 490 was introduced. Whatever may be the scope of the present s. 490, it would seem to be clear that the present s. 491, which was already in substantially the same form on the statute-book, specifically provided for just such a case as this, and that its scope should not be lessened by the enactment of s. 490. It may

be that a more complete discussion of the somewhat important changes made in other sections of The Municipal Act of 1913 dealing with highways, than was presented to the Court upon the argument of this appeal, might serve to clarify the situation so far as ss. 490 and 491 are concerned. At present I would prefer to reserve the right, in the event of the point arising in another case, to alter my present opinion if further light can be thrown upon these sections of the statute. As I have already stated, the appellant is entitled to succeed on an entirely different ground. I, therefore, concur in the result reached by my brother Roach.

ROACH J.A.:—This is an appeal by the Municipal Corporation of the Township of Proton from an award dated 8th September 1948, made by His Honour Judge Morley, County Court Judge for the County of Grey, with reference to the opening of a part of a road allowance on the boundary between the Township of Proton and the Township of Egremont.

The road allowance in question is under the joint jurisdiction of the two municipalities by virtue of s. 460 of The Municipal Act, R.S.O. 1937, c. 266. The council of the Township of Egremont desired the road allowance to be opened; the council of the Township of Proton opposed it.

Under date the 12th July 1948 the council of the Township of Egremont at a special session passed a by-law, being by-law no. 13 for 1948, the operative part of which is as follows:

"1. That we, the Council of the Township of Egremont, are in favour of proceeding with the work of opening & maintaining as a public road, the Egremont & Proton Townline between Concessions 14 & 16 Egremont Township.

"2. That we request the Council of the Township of Proton to pass a similar by-law.

"3. That this by-law shall take effect & come into force from & after the passing thereof."

A copy of that by-law was served on the clerk of the Township of Proton together with a notice reading as follows:

"The attached by-law is a copy of a by-law passed at a special meeting of Egremont council held July 12th, 1948.

"Please take notice that unless the Council of Proton Township agrees to pass a similar by-law, and reply to Egremont Township Clerk within four days, we have arranged to have the



matter arbitrated before the County Judge in the Court House, Owen Sound, at the hour of ten o'clock A.M. on Monday, the twenty-sixth day of July, A.D. 1948.

"This action is pursuant with & according to the provisions of the Municipal Institutions Act, chapter 266, Section 490."

The notice is dated the 13th July.

The council of the Township of Proton did not comply with the notice, and the County Judge conducted the hearing on 30th July and 1st September. On that hearing both Townships were represented by counsel.

Under date 8th September the County Judge made his award by which:

(1) He directed that the road allowance in question be forthwith opened and maintained.

(2) He awarded that the costs of opening up be borne 54 per cent. by the Township of Egremont and 46 per cent. by the Township of Proton.

(3) He directed that the council of each of the Townships pass a by-law in accordance with the award.

The grounds of this appeal are several and include the following:

(1) That the County Judge lacked jurisdiction.

(2) That s. 490 of the Act is not applicable.

(3) That if s. 490 is applicable, by-law no. 13 is not a sufficient by-law within that section.

The right of appeal to this Court from an award made under the authority of s. 490 is given by s. 356(2) of The Municipal Act and s. 7 of The Municipal Arbitrations Act, R.S.O. 1937, c. 280.

For convenience I copy s. 490 and parts of s. 491 of The Municipal Act:

"490. (1) Where a highway or bridge is under the joint jurisdiction of the councils of two or more municipalities and they are unable to agree as to any action which one or more of them desire to be taken in the exercise of such joint jurisdiction, any of them may require that the matter in dispute shall be determined by arbitration, and in that case shall prepare a draft by-law for carrying into effect what it is desired shall be done,

and serve a copy of it on the clerk of the other municipalities with a notice that it is its desire that such a by-law shall be passed.

“(2) If it is determined by the arbitrators that what is proposed ought to be done, they shall by their award so direct, and in that case each council shall forthwith after notice of the award pass a by-law in accordance with the draft by-law and shall, without unnecessary delay, do all things which on its part are necessary for carrying into effect the objects of the by-law.

“491. (1) Where the councils of the townships having joint jurisdiction over a township boundary line fail to agree as to the character of the work to be done in opening, maintaining or repairing it, or as to the proportions in which the cost of the work is to be borne by the corporations of the townships respectively, any or either of such councils may apply to the council of the county to determine the matters in dispute.

“(2) Where the township councils having the joint jurisdiction over it neglect or refuse to open up and make, maintain and keep in repair any such boundary line, a majority of the ratepayers resident on land abutting on it may apply to the council of the county to enforce the opening up and the making, maintaining and keeping in repair of such boundary line.

“(3) The application shall be by petition and the council of the county after notice to all the corporations interested and after hearing them and the petitioning ratepayers, if the petition is by ratepayers, or such of them as desire to be heard, shall determine in the case provided for by subsection 1, what work shall be done and the proportions in which the cost of it shall be borne by the corporations of the townships respectively, and in the case provided for by subsection 2 whether the boundary line shall be opened up and the proportions in which the corporations of the townships shall respectively bear the cost of opening up, making, maintaining and keeping in repair the boundary line, and in either case may direct that the statute labour or part of it shall be applied by each of the corporations for such purposes.”

The history of the legislation now contained in ss. 490 and 491 is not without significance.

What is now s. 490 was first enacted in 1913 as s. 467 of The Municipal Act of that year, being c. 43.

Section 491 goes back with variations to 1866, 29-30 Vict. c. 51.

In The Consolidated Municipal Act, 1903, 3 Edw. VII, c. 19, the forerunners of subss. 1, 2 and 3 of the present s. 491 appear as ss. 648, 649, 650 and 651. For convenience I copy them:

“648. Wherever township councils fail by mutual agreement as to the share to be borne by each, to maintain township boundary lines not assumed by the county council, in the same way as other township roads, it shall be competent for one or more of such councils to apply to the county council to enforce joint action on the part of the councils of all the townships interested.

“649. In cases where the councils of all the townships interested neglect or refuse to open up and repair such lines of road in a manner similar to the other local roads, it shall be competent for a majority of the ratepayers resident on the lots bordering on either or both sides of such line, to petition the county council to enforce the opening up or repair of such lines of road by the councils of the townships interested.

“650. A county council receiving such petition, either from township councils or from ratepayers, as in the preceding section mentioned, may consider and act upon the same at the session at which the petition is presented.

“651. The county council may determine the amount which each township council interested shall be required to apply for the opening or repairing of such lines of road, or may direct the expenditure of a certain portion of the statute labour, or both, as may seem necessary to make the said lines of road equal to other roads.”

As the legislation then stood I should think that it was at least arguable that s. 648, although it did not refer in terms to the opening of a road along a boundary-line, should be construed as being wide enough to include disputes between township councils as to whether or not road allowances which were boundary-lines between such townships should be opened. That argument would find support in the wording of s. 651. If this argument were not sound then in the case where the township



councils disagreed as to whether the road allowance should be opened, that is to say, where the council of one Township desired it opened and the council of the other Township did not, I do not think the ratepayers to whom certain rights were given by s. 649 had the remedy thereby granted. In that circumstance could it be said that "the councils of *all* the townships interested" neglected and refused to open the road? I think not.

Then by the Act of 1913 s. 648 was amended and became s. 468(1) and is now s. 491(1); s. 649 was amended and became s. 468(2) and is now s. 491(2); and ss. 650 and 651 were redrafted and became s. 468(3) which is now s. 491(3).

By the 1913 amendment, what is now s. 491(1) expressly relates to disputes between township councils concerning the opening up of such road allowances. The section describes those disputes as disputes (1) "as to the character of the work to be done in opening, maintaining or repairing" such boundary lines; and, (2) the proportions in which the cost of the work to be done is to be borne by the respective Townships.

The question in this appeal is whether or not s. 491(1) includes a dispute as to whether or not a road allowance should be opened. Counsel for the appellant argues that it does; counsel for the respondent argues that it does not and that s. 490 applies.

Although the question is not entirely free from difficulty, I am of the opinion that s. 491(1) is the relevant section.

If the contention of counsel for the respondent were to prevail, it would mean that the Legislature, when enacting the 1913 amendments to which I have referred, with its legislative mind then focused on possible differences that might arise between township councils concerning the opening of road allowances, set apart for determination by county councils all disagreements that might arise, with one exception only, namely, a disagreement as to whether or not the road allowance should be opened. It would result in that particular disagreement being determined by the County Judge as an arbitrator under s. 490 and the same question at the behest of ratepayers being determined by the county council under s. 491(2). Although to me it does not appear that there could be any convincing reason for such dis-

tion, it would still be competent for the Legislature to make it. I do not think, however, having regard to the language used in s. 491, that the Legislature intended such a distinction or indeed that it made it.

I should think that there could be no dispute as to this, namely, that "to open up a road allowance" means to create a highway in fact where there was previously only one in law, that is to say, to open it for public travel. The distinction between a highway in fact and a highway merely in law is pointed out in *Hislop v. The Township of McGillivray* (1888), 15 O.A.R. 687, affirmed (1890), 17 S.C.R. 479. Since to open a road is to invite the public to travel upon it, this involves the spending of money or labour in making the road.

The foregoing concept is reflected in the language of s. 491, namely, "Where the councils of the townships . . . fail to agree as to the character of the work to be done in opening" the road. These words, in my opinion, may be rationally construed as embracing a disagreement as to whether or not any work should be done for the purpose of opening the road.

The foregoing construction is necessary in order that subs. 1 may be, as I think the Legislature has clearly indicated it should be, fully complementary to subs. 2. Subs. 2 is obviously designed to give the ratepayers resident along an unopened road allowance a remedy by which its opening by the two Townships having joint jurisdiction over it may be enforced. In the instant case could those ratepayers say that "the township councils having the joint jurisdiction"—and that means the councils of *both* Townships—were "neglecting and refusing to open" the road? The council of the Township of Egremont, far from refusing and neglecting to do so, is ready and willing and anxious to open the road, but it cannot do so alone. It requires the co-operation of the council of the Township of Proton. Unless Egremont can have the dispute determined by some tribunal, then the road must remain unopened because, in my opinion, the ratepayers could not invoke s. 491(2).

In my opinion it was for the purpose of meeting just such a situation that the Legislature made the amendments now em-

bodied in subs. 1 to cover expressly the case of a disagreement between the township councils concerning such opening. In other words, the Legislature has given to the county council the power to enforce the opening up and making of the road and to apportion the cost of so doing between township councils, that power to be exercised under subs. 1 on the petition of the council of the willing Township, whereas under subs. 2 it is exercisable on the petition of the majority of the ratepayers.

Section 491 deals specifically, *inter alia*, with the opening of township boundary-lines, and the general provisions of s. 490 must yield to it.

It follows, therefore, that the County Judge had no jurisdiction to arbitrate this dispute.

That is sufficient to dispose of this appeal. I have only this further to add, namely, that even if s. 490 had any application to the circumstances of the disagreement here in question, by-law no. 13 actually passed by the council of the Township of Egremont is not a compliance with the requirement of s. 490(1). What the section requires is "a draft by-law for carrying into effect what it is desired shall be done". Then later, if the arbitrator decides that what is proposed ought to be done, each council shall, after notice of the award, pass a by-law in accordance with the draft. By-law no. 13 in substance is no more than the expression of a desire that the road be opened. It is not a by-law for carrying into effect what the council of Egremont desires. It does not authorize the opening of the road or provide for the cost thereof or the cost of maintenance.

This appeal should be allowed for the reasons stated and the award of the County Judge should be quashed. The appellant is entitled to its costs of this appeal.

HOGG J.A.:—I agree with the decision reached by my Lord the Chief Justice and my brother Roach and with the clearly expressed reasons given by them in support thereof.

The facts are set out in detail and the history of the legislation is discussed by Mr. Justice Roach. I wish merely to refer briefly to one aspect of the subject as it has presented itself to me.



The matter which was of concern to the two interested Townships was the opening and the subsequent maintaining of the boundary-line between them. Section 490 of The Municipal Act refers to and deals with the situation where two or more municipalities are unable to agree "as to any action which one or more of them desire to be taken" with respect to a highway or bridge under their joint jurisdiction. The words "any action" in this section, unless limited or qualified by some other provision of the statute, might be held to embrace the work of opening and maintaining a highway or bridge forming the boundary, or part of the boundary, between two or more townships.

From the fact that the word "highway" and also the word "bridge" are mentioned, it could, I think, be seriously contended that the highway contemplated by s. 490 is not merely an unopened boundary-line but is a road, such as may have a bridge forming part of it, that is to say, a road that may be used for the usual purposes. The definition of the word highway in s. 1(f) of the Act is that it "shall mean a common and public highway, and shall include a street and a bridge forming part of a highway, or on, over or across which a highway passes". This definition lends some weight I think, to the view that the highway contemplated by s. 490 is an actual road and not merely a boundary-line or allowance for a road before it has been opened and made into a highway or road that can be used by the public.

Section 492 speaks of the deviation of the road from the boundary-line, and of the use of an existing highway in lieu of such deviation. Here the words "road" and "highway" signify something other than the boundary-line itself.

Section 491 is concerned solely with the work of opening, maintaining and repairing a township boundary-line. The section would seem to be directed only to the making of a road and the maintenance and repair of such road where before there existed only a boundary-line between townships.

The fact that s. 491 specifically provides for the opening of a boundary-line, would seem to place a limitation upon the general words "any action" found in s. 490, and to exclude from

the operation of that section the matter of the opening of a boundary-line.

*Appeal allowed with costs.*

*Solicitor for the Township of Proton, appellant: Campbell Grant, Walkerton.*

*Solicitor for the Township of Egremont, respondent: F. G. MacKay, Owen Sound.*

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[McRUER C.J.H.C.]

**Brydon v. Hawkins.**

*Fraud and Undue Influence—When Undue Influence Presumed from Relationship—Husband and Wife—Physical Disabilities of Husband-donor.*

Although the relationship of husband and wife is not one of those in which undue influence is presumed from the mere existence of the relationship (as it is in the case of solicitor and client, parent and child, etc.), this does not mean that the doctrine of *Huguenin v. Baseley* (1807), 14 Ves. 273, can never be applied to that relationship, or that the onus is always on persons who attack transactions between spouses to prove affirmatively that undue influence existed. *Bank of Montreal v. Stuart et al.*, [1911] A.C. 120, explained; *MacKenzie v. Royal Bank of Canada*, [1934] A.C. 468, discussed. The underlying equitable rule is that if a donor is in a situation in which he is not a free agent, and is not able to protect himself, a Court of equity will protect him against being taken advantage of by those in a position to do so because of their position. *Vanzant v. Coates* (1917), 40 O.L.R. 556, applied. Each relationship must be examined in the light of the facts, and where a husband, by reason of physical infirmity, is incapable of communicating his will to others of his own initiative, or of protecting himself by discussion with others, by getting advice and making known to others the things that might concern him in parting with his property, he should be taken to stand in such a relation to his wife that the equitable principle is applicable, and if a gift made by him to his wife is attacked, the onus will be on her to rebut the principle of undue influence by evidence such as is described in *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127 at 135.

THREE ACTIONS, tried together, to set aside gifts from a husband to his wife. The particular relief sought is fully stated in the reasons for judgment.

18th to 22nd and 25th October 1948. The action was tried by McRUER C.J.H.C., without a jury at Toronto.

*G. W. Ford*, for the plaintiff.

*E. G. Black, K.C.*, for the defendant.

25th October 1948. McRUER C.J.H.C. (orally):—Three actions are brought, two by the plaintiff Kathleen Rosalie Brydon against the defendant Lettie Pearl Hawkins, and one by the plaintiff Kathleen Brydon as executrix of the estate of the late William Hawkins against Lettie Pearl Hawkins. This last action was commenced as a class action by Kathleen Rosalie Brydon, Laurence Webber Hawkins and Harold William Hawkins suing on behalf of themselves and all other persons interested in the estate of William Hawkins. Another case came on for trial before me immediately before these three cases. In that case Kathleen Brydon was seeking to propound a will dated the 26th April 1946, said to have been executed by William Hawkins. On



that action coming on for trial, counsel for the defendant Lettie Pearl Hawkins, who was seeking to propound an earlier will dated the 24th October 1944, stated that he offered no evidence, and judgment therefore went in favour of the plaintiff establishing the will of the 26th April 1946, under which she was named as executrix, and in which she and her brothers Harold Hawkins and Laurence Hawkins were beneficiaries. Following this judgment the plaintiff asked leave to amend the third action by substituting Kathleen Rosalie Brydon as executrix of the estate of the late William Hawkins as plaintiff for the named plaintiffs. This order was made without objection, and the case proceeded in that form.

In the first action the plaintiff claims that the documents under which the defendant was named beneficiary under two policies of insurance in the Montreal Life Insurance Company dated the 14th February 1947, in the place and stead of the plaintiff, who had been beneficiary under the said policies, should be set aside and declared null and void as against the plaintiff. Other relief is claimed, to which it is unnecessary to refer.

In the second action the plaintiff claims that the revocation of her interest under a certain policy of insurance in the Metropolitan Life Insurance Company amounting to \$2,000 by way of a change of beneficiary executed on the 8th August 1946 should be set aside and declared null and void.

The proceeds of the last policy have been paid into court. The proceeds of the other policies, amounting to \$2,000 in all, have been obtained by the defendant and are still retained by her.

In the third action the plaintiff claims that a gift to the defendant of a property known as 43 Thelma Avenue in the village of Forest Hill should be set aside and that she be called upon to account for the proceeds of the sale of that property.

It is particularly important in this case that the Court should try as far as possible to gather from the evidence a very clear understanding of exactly what the relative positions of all the parties were at the time that these questioned documents were executed. I think the best means of appreciating those positions is by carefully considering the chronological sequence of events.

The deceased William Hawkins carried on business for many years as what is called a landscape gardener; I think it might be more accurate to describe him as a gardener who did custom

gardening for those who lived in the district. He lived on the Thelma Avenue property. His son Harold worked in association with him in this business for many years at the modest wage of \$22 a week, out of which he paid his parents, and later his father, \$7 a week for his board. It could have been only by the most frugal and careful management that an estate of this substance could have been built up. The family consisted of the father, the mother, and the three children, Kathleen, Harold and Laurence, all living at home.

In 1932 the father gave a power of attorney to his son Harold for the purpose of permitting him to do what banking business was necessary in order to carry on their work. On the 13th May 1937 Mrs. Hawkins, the mother of these three children, died. There is no suggestion that there was not at all times great affection between the children and their parents, and later, until his death, between the children and the father. In 1938 the late William Hawkins took a trip to England, and, in order that business might be done during the time he was away, he again gave a power of attorney to his son Harold. This power of attorney continued in effect until the day after the defendant's marriage with Mr. Hawkins; the circumstances of its revocation will be dealt with in due course.

As early as 1939 the defendant, who was then known as Mrs. Burke, was acquainted with Mr. Hawkins. In 1940 she became his housekeeper, and at a later date the daughter Kathleen, who was married and had been living at home and looking after the house, moved out. Late in 1941 Mr. Hawkins suffered a stroke. About a week before, his son Harold and he were having a friendly chat, and during the course of it the father made this curious remark: "Do you think I will ever marry Mrs. Burke?" and said, "No, she has the tongue of a viper." The defendant said in her evidence that there had been discussions of marriage with Mr. Hawkins before he had the stroke. It is to be observed that it was not until 1942 or thereabout—the precise date was left in some obscurity—that the defendant's marriage with Burke was terminated by a divorce.

The stroke suffered by Mr. Hawkins greatly impaired his normal faculties of communication. He was attended at that time by Dr. McBroom, who gave evidence, and I wish to say that I accept Dr. McBroom's evidence in its entirety. He was the family physician and had attended the Hawkins family for

many years. He said that Mr. Hawkins had been a patient of his for 19 years and remained so until March 1946; that prior to the stroke he was a strong-minded man, but he changed after the stroke. He says a stroke always damages the mind, but the result of this stroke was that Mr. Hawkins was so affected that he could not speak or write. The doctor said he was always very co-operative and wanted to please, and that Mrs. Hawkins was the dominant character in the household; that she was much stronger mentally than he was, and that he would be subject to her influence. I asked Dr. McBroom whether anyone dealing with Mr. Hawkins would be able to know whether he comprehended the nature and consequences of a legal document, and the doctor said that he had no means of communicating so that one could understand that he knew the legal effect of anything that was explained to him. There is some conflict in the evidence as to whether he could read or not. It is quite clear that, upon being questioned by Mr. Currie, a solicitor, in a manner with which I shall deal later, as to his ability to read, he indicated that he could not read a very simple letter, and that he had been able to read prior to the stroke but was not able to read after it. It is quite apparent that Dr. McBroom took a friendly interest in Mr. Hawkins and in the family, and there is no explanation as to why his services were discontinued in 1946. The evidence seems clear that from this time until his death Mr. Hawkins was totally unable to communicate any idea of his own to anyone, nor was he able to express himself in any way so that anyone dealing with him would know or understand what he meant, other than mere conjecture from motions—that is, with respect to any matter that originated in the mind of Mr. Hawkins. The method of communication adopted was to ask him questions, and he would respond by a nod or a shake of his head, with the word “yes” improperly enunciated or the word “no”, as indicating affirmative or negative answers. It is well, therefore, in considering this whole case, to consider the grave limitations that were on Mr. Hawkins with respect to his ability to convey to any other person what was in his mind.

About three months after the stroke, following previous discussions about trying to better herself, the defendant left the Hawkins home and took up residence across the street, where arrangements had been made for the accommodation of her



daughter a short time before she actually moved. Mrs. Brydon came back to keep house for her father, and Harold Hawkins lived at home; Laurence was drafted into the army. Sometime in 1942 or 1943 the defendant was divorced. Meantime Harold Hawkins was carrying on the gardening business until he was required during the war to do war service; he was not drafted into the army on account of being the support of his father.

On the 24th October 1944 the defendant and Mr. Hawkins were married. Their intention to be married was not communicated to the members of the family, nor was the fact of the marriage communicated to them for about three weeks, and then only after Harold and Kathleen had become suspicious and interrogated their father as to whether he was married or not and if so to whom. By his only means of communication he nodded in the affirmative and pointed across the road, indicating the defendant. Mrs. Brydon's suspicions had been aroused by something that had happened upon a visit of her father to her aunt, and they had rather deduced that there was something about marriage that he was trying to communicate to the aunt. On examination for discovery the defendant was asked:

"86. Q. Did the family or any of the children know of your marriage at the time? A. No.

"87. Q. Why was that? A. Well, because I didn't tell anybody.

"92. Q. When were your first discussions with them indicating you were married? A. My first and only discussion with them was the day I went over there when this row was. That was the only time.

"93. Q. That was about how long after the marriage? A. Well, that must have been about a month or more, as far as I recall."

This silence with respect to the marriage with the man living across the street from her is probably explained by what happened during the interval. On the 25th October, the day following the marriage, the defendant visited the bank where Mr. Hawkins's bank account was kept and where his safety-deposit box was, and had the power of attorney that had existed in favour of the son changed to her own name. No doubt the keys of the safety-deposit box were in the hands of the son, who had previously managed the box. Instead of requesting the delivery of the keys, they had the box bored at the bank

and opened. Following this the defendant looked after the bank account and did all the business that was to be done in connection with Mr. Hawkins's business. It is true that it was limited, but, at the same time, it was all his business.

On the 27th October, three days later, a will was made in favour of the defendant, and all the insurance on the life of Mr. Hawkins, which had been payable to his former wife, was transferred about the same time to the defendant.

I may pause there for a moment to go back to what took place a few days before the marriage. The defendant went with Mr. Hawkins to see Dr. McBroom, and told him that they were thinking of getting married. I do not think Dr. McBroom gave them very much encouragement. The defendant says, or it is suggested, that Dr. McBroom said that Mr. Hawkins might live 20 years. Dr. McBroom positively stated that he would never make any such suggestion; he did not regard it as a possibility that Mr. Hawkins would live any such length of time. He sent them to see Dr. Armour. They went to see the Rev. Mr. Mustard, who eventually married them, and had some discussion with him. The defendant says that she was doing this for fear there might be some trouble about the marriage. It seems to me, having in mind what happened so quickly after the marriage, that at that early date the defendant had a plan in her mind.

The defendant in the witness-box impressed me as a clever, scheming woman, to whom I would give very little credit on her oath. It seemed to me that in giving her evidence she was more concerned with the effect that it would have on the result of the case than with its truth. There was very considerable conflict on one important matter between her evidence as given at the trial and her evidence as given on the examination for discovery. I have no hesitation in finding that her evidence is not dependable.

She said at the trial that she had had talks with Mr. Hawkins about his property prior to the marriage, and that he had communicated to her that he wanted her to have his property. She says that the night before the marriage she asked her niece to come over, that she wanted her to act as a witness at the wedding; that she explained to her niece in the presence of Mr. Hawkins about their plans; that she explained at that time that

the property was to be given to her; and that Mr. Hawkins assented to it, coming over and putting his arm around her. Her evidence on this point on examination for discovery was as follows:

"113. Q. When did you first discuss the question, if you did, of the registration or transfer of the property, that is 43 Thelma Avenue, with Mr. Hawkins? A. I don't remember just exactly how that was.

"114. Q. About when? A. I don't know, unless it is down here some place.

"115. Q. When it was transferred, is that about the first time there was any discussion with him? A. Yes, when it was transferred.

"116. Q. I see there was a transfer, first a joint tenancy, dated the 27th August 1945? A. Yes.

"117. Q. When prior to the actual transfer did you first have a discussion with him about this property? A. Well, I haven't any idea. It wasn't long because it was all done—We talked it over and we went down to Mr. Currie and had the titles of the property put in both of our names. I had my name added to it.

"118. Q. I presume you knew before that the property was registered in Mr. Hawkins's name only. Is that right? A. Yes.

"119. Q. Or had it been registered in the names of Mr. Hawkins and his first wife, or do you know? A. I think not. It was registered in Mr. Hawkins's name, as far as I know.

"120. Q. What was the nature of the discussions? A. Well, I was doing the business and I asked Bill didn't he think it would be better to have it in both of our names and I could sign the papers as well, more or less as a protection that we would have a home in case anything should ever happen. I was working and I felt that I should at least have some protection, being his wife, and we talked it over and I asked him did he think it was all right, and he said yes, he was quite agreeable to it. So we went down and talked it over further with Mr. Currie and in front of Mr. Currie, I asked him what he thought of it and he said it was only the fair thing and it should be done that way."

There was not a suggestion of this pre-nuptial arrangement in the examination for discovery. I should have thought it would



have been an outstanding event in the mind of the defendant if prior to the marriage she had been promised the house in which she was going to live, but she makes no mention of it in answer to these questions, and the first that is heard of it is in her evidence in the witness-box.

The corroboration of this pre-nuptial agreement is the evidence of a niece who was said to have been present, together with an aunt, who has not been called at the trial. The only reason given for not calling her as a witness is that she is living in Stratford. The defendant herself lives in Stratford. I was not at all impressed with the niece's evidence; it seemed to me that the niece was telling a neat story that had been put in her mouth, and I cannot on the evidence find that there was any such pre-nuptial agreement.

We proceed then chronologically from there. Immediately after the marriage a solicitor was consulted—not Mr. Hawkins's regular solicitor, Mr. Cattanach, who had drawn the will—in reference to a bond and the balance of the bank account which Harold Hawkins and Mrs. Brydon had removed from the Bank of Nova Scotia and put in another bank—they say, and it is not questioned, under Mr. Hawkins's name—and there is no evidence to suggest that they were doing other than trying to protect their father from the danger of losing these liquid assets. Harold Hawkins gives an explanation—and I do not question his veracity; Mrs. Brydon, Harold Hawkins and Laurence Hawkins all impressed me favourably as witnesses—that after having heard of his father's marriage they took steps to have the bond moved from the one bank to the other for fear it would be lost. It is to be observed that the safety-deposit box was opened and the bank account was investigated the next day after the marriage, and these changes had been made at that time. It may well be that four years later there is some confusion in regard to that, but there is no suggestion that they misappropriated the money. It may be that they thought the father was getting too friendly with the defendant, and that marriage might develop. However the course that was taken with respect to this bond—whether it was the fault of the defendant or the fault of the solicitor who advised her; it probably is more attributable to the latter—was that an information was sworn out against Harold Hawkins and Kathleen Brydon charging them with theft, and a

summons was issued. They returned the bond and the money in the bank account was turned over to the defendant's control and that was the end of the criminal proceedings. I put it to the defendant, "You were instituting criminal proceedings for the purpose of collecting a debt?" and she said "Yes."

About the 1st December 1944 the defendant moved into 43 Thelma Avenue. The change of occupancy was not effected under the most pleasant circumstances. There was an acrimonious discussion, bad language used, and slapping of faces. It is said that Mrs. Brydon called the defendant a filthy name, and that she retaliated by slapping her face. I do not think that anything much turns on that incident in this case.

That brings me now to discuss the transfer of the real estate to the defendant. On 27th August 1945 a deed was executed by Mr. Hawkins, conveying the property 43 Thelma Avenue to him and the defendant as joint tenants and not as tenants in common. In her examination for discovery the defendant gives the following account of the origin of the idea of this transfer:

"120. Q. What was the nature of the discussions? A. Well, I was doing the business and I asked Bill didn't he think it would be better to have it in both of our names and I could sign the papers as well, more or less as a protection that we would have a home in case anything should ever happen. I was working and I felt that I should at least have some protection, being his wife, and we talked it over and I asked him did he think it was all right, and he said yes, he was quite agreeable to it. So we went down and talked it over further with Mr. Currie and in front of Mr. Currie, I asked him what he thought of it and he said it was only the fair thing and it should be done that way."

(I take it that the defendant is referring there to a statement of Mr. Currie's, not a statement of Mr. Hawkins, because Mr. Hawkins was quite incapable of making any such statement.)

"125. Q. What did you understand was the effect of that transfer or the purpose of it? What was in your mind when you suggested it to Mr. Hawkins? A. Oh, for protection, as I say, that we would have a home over our heads, and I was conducting the business for Mr. Hawkins and I thought it was better to have my name on it, and his as well, for protection so that we would have a home."

Those answers have some considerable importance, considering the fact that they were made on the examination for discovery, before the intensive preparation and thinking for the trial was done. When one considers what was actually taking place, together with the limited character of the deceased Hawkins's ability to take any part in the discussion of any transaction, one can see how his mind at that stage would be misdirected if that was the nature of the inducement, if I may so call it, that was held out to him to enter into the transaction in the first place—a sort of mutual security so that they would have a home over their joint heads, is the idea that is conveyed in that explanation.

The parties went to Mr. Currie. There is no explanation of why they did not go to Mr. Cattanach, who had apparently been looking after Mr. Hawkins's business for years, and who would have had knowledge of the whole situation with respect to the family and his obligations to the family. It was suggested by the defendant in evidence, I think, that something was said to Mr. Cattanach and he said he was not doing that kind of business any more, he was doing more real estate. Well, this was essentially a real estate transaction.

Mr. Currie was called as a witness, and, for reasons that I shall mention when I come to discuss the next transaction, I think, unfortunately—and it is with regret that I feel I must say it—Mr. Currie's evidence must be taken with reservations. With regard to the final transaction, a very regrettable thing happened; a thing that is not consistent with the actions of a man fully possessed of a consciousness of the responsibilities owed to Mr. Hawkins in the circumstances.

On the first occasion, Mr. Currie says, the defendant called him up and stated that her husband wished to deed the property to her outright. Now, it must be borne in mind that any suggestion of Mr. Hawkins's wishes with regard to a complicated transaction of this sort could not be conveyed except by some question initiated by another person. She was the one who selected Mr. Currie, and she took Mr. Hawkins to him. He says he recognized the explosive nature of the transaction; it was obvious to him, he says, that it was likely to be attacked by members of the family. He says that he enquired into the matter by putting such questions to Mr. Hawkins as he could



and putting questions to the defendant, and that he decided that the best course to follow was to make a deed as joint tenants rather than a transfer of the whole property to the defendant outright.

During the interview that took place in his office, and after about 15 minutes or half an hour of discussion of the matter, he called in his secretary and dictated to her a memorandum—at least, there are two paragraphs of a memorandum filed as part of ex. 13 which were dictated at some time. The secretary was instructed to take a record of what took place, and she took a partial record of what took place. She took down five questions that were put to Mr. Hawkins in the presence of the defendant; then she was asked to leave, and a series of questions was put to Mr. Hawkins, to which he responded by a nod of the head or a shake of the head, indicating “yes” or “no”. Throughout the whole of this interview there is no suggestion that Mr. Hawkins’s mind was directed to the question of whether or not he had obligations to his own family, who undoubtedly had contributed a very considerable amount, by their joint efforts, to building up the assets that he had. It seemed to be a scheme for providing security for the defendant that they had in mind, and that is quite consistent with her examination for discovery. The mind of Mr. Currie was not directed toward the subject of Mr. Hawkins preserving security for himself, and much less was the mind of Mr. Hawkins so directed. The full legal incidents of a joint tenancy were not explained, and in view of what followed this may have some importance, as it was not brought home to Mr. Hawkins that he would from then on have a right to dispose of his share of the property during his lifetime, that is, that he could defeat the right of descent by a mere deed of his share to his family. It was not explained to him that the defendant might part with her share and that he would be left in the uncomfortable position of having some other person own a half share of the property in which he lived. Mr. Currie did on this occasion test Mr. Hawkins’s ability to read, as I have indicated, and that satisfied him that he could not read and comprehend the meaning of a very simple letter. I shall deal more fully with the effect of this transaction a bit later, but I do not think it can be dissociated from the transaction of the 14th February 1947.

It seems to me clear that the defendant had a consistent plan from the beginning, that she was going to get for herself complete control over all of the assets of the deceased Hawkins, and it was Mr. Currie's limited caution that prevented her from getting control on the 27th August 1945.

But she was not through at that date. In 1946, I think on the 26th April, the deceased transferred his insurance to his daughter, Mrs. Brydon, having the right to change the policies from one preferred beneficiary to another, and he made the will which was the subject of the other action, in favour of his children. The defendant said in her evidence that the deceased always loved his children, and there is no suggestion that there is any reason why, under proper guidance and advice, he would have so completely excluded them from any participation in his estate as was done on the 14th February 1947, when the events of that day are taken together with what happened the day before he died.

The defendant's explanation of this trip to Mr. Currie's office on this date, which was no doubt initiated by her, is given in her examination for discovery, as follows:

"205. Q. When was that transfer? A. After I found out how things were being done and how things have been changed over to Kathleen, and that sort of thing, I said well, I had better get busy or we won't have a house over our heads at all; if he is transferring these things over to Kathleen the first thing I know there won't even be a house to live in and he wouldn't have a home, and I wouldn't have a home either. I was working at the time, and it was just getting me down, these various things cropping up all the time, so I decided to protect both Mr. Hawkins and myself and that I would have the house made over to me.

"206. Q. Made over to you absolutely? A. Yes, absolutely. Then when I had my will made up at Mr. Currie's I had Mr. Currie put in the will that in case of my death before Mr. Hawkins that the house and everything was to go back to Mr. Hawkins and he would still have them back as before, but if he died before I died it was to be mine; but of course that wasn't in the will.

"207. Q. So that you have told me the reasons that prompted you in having the transfer to you as sole owner of the property?

A. Yes.

"208. Q. I take it then you took this up with Mr. Hawkins and asked him to do that, is that correct? A. Yes, I did.

"209. Q. Tell me what was your conversation with him?

A. Well, apparently, I went home from work one night and Mr. Hawkins was all upset and he tried to tell me something and he went around like this—

"210. Q. You indicate moving his hands? A. Yes, with his hands, you know, and I couldn't for a long time figure out what was the matter. So finally I found Kathleen wanted the father to sell the house and he wanted to know if we would sell the house."

(That Mrs. Brydon denies, and I accept her denial when she says there was no such conversation with her father.)

"216. Q. Correct me if I am wrong when I say anything but do you mean when you had this conversation with him about the property being transferred to you as sole owner you told him what you would do about a will? A. No. I told him that as long as we both lived we will live here together and if you die before I die it would be my home, I would have a home, that I wasn't as young as I used to be and needed a home but, I said, if I die before you die the home is yours the same as it is right now. I said, I want you to know that you would always have a home. I don't think it was just he was giving it to me. I thought a lot of Mr. Hawkins. Some people think I didn't, but I did."

Then at q. 268 she says that Mr. Currie was her personal solicitor, and at another place that he was not the solicitor of Mr. Hawkins. There is some qualification of that in the evidence, but for the purpose of this trial I do not think it has any very great importance, because she was the one who selected Mr. Currie, and I do not think it was ever put to Mr. Hawkins in any intelligible way as to whether Mr. Currie was really acting for him or not, but he undoubtedly was undertaking some responsibilities toward him.

In giving evidence at the trial the defendant said that she was not afraid of Mr. Hawkins making a sale, but she was afraid of him signing away his rights in the home to the family, because she had learned that the insurance had been transferred



to Mrs. Brydon. I had the reporter run off part of the defendant's evidence, so that I might have very accurately what she said, and this is her explanation *verbatim*:

"Q. Did you talk over with Mr. Hawkins a change in the house? A. After the insurance had been turned back to Kathleen and that, and he had signed those papers apparently, I realized that he was signing those papers, there could be a possibility of him signing the house away, so I suggested to Mr. Hawkins, or talked to Mr. Hawkins, and I asked him, I said, 'Bill, since the insurance has been turned over from me, don't you think it would be a good arrangement to put the house solely in my name, *just as a matter of protection for a home?*'"

"HIS LORDSHIP: Q. You said, 'Don't you think it would be a good idea to have the house in my name'—as what? A protection? A. To keep the home.

"Q. What was it you said? A. As a protection.

"Q. For a home, or as a home? A. For a home.

"MR. BLACK: Q. What was Mr. Hawkins's reaction to that suggestion? A. Well, after we talked for quite some time, and I explained to him if he were to sign the house away, that with me working, that I could not afford to pay rent and carry on expenses and keep a home unless we had that home there. And I also told him that if I died before he did I didn't want the home; I merely wanted a home for he and I to enjoy together, and I told him that I would have an attachment on my will to the effect that should I die before he died, that the house and everything was to go back to him, that I would have nothing whatever, *or my heirs would have nothing whatever to do with the home, it was his as of now*, and if he should die I would have to continue on to work and the home should be mine and I could live there. And after we had talked for quite some time he agreed that he thought it would be a very good arrangement, and I said that I didn't want him to think that I was trying to get the home because I wasn't; I was merely doing it to make a home for both himself and myself."

Having regard to this woman's mental capacity and her position with respect to all his affairs, taking her own statement, it seems to me that what was being put to Mr. Hawkins was a plan to protect them both, to have a home over their heads for life. She is saying that she was not trying to get the home,

“because I wasn’t; I was merely doing it to make a home for both himself and myself”. Now, there are plenty of ways in which deeds could have been drawn to give effect to the idea of protecting them both for life, but that was not the plan that was even considered by Mr. Currie.

The parties went to Mr. Currie’s office, and here I come to the point where, unfortunately, I cannot be otherwise than very critical of Mr. Currie’s conduct in the case. Again he called in his secretary to make a record of what took place. A record of her version, at any rate, was transcribed, and this at some time or other, we do not know when, Mr. Currie destroyed. He knew the difficulties that might arise, he recognized the case as one over which there was likely to be litigation—that is why he had the secretary there—yet the first-hand record of the secretary’s version of what happened was destroyed, he says because she took it down in the third person instead of question and answer, *verbatim*. Well, part of the record that has already been filed is done in that way, and a very important part of it is abridged.

But that is not all. When it came to drawing the documents and explaining them to Mr. Hawkins, Mr. Currie fell far short of what was required of him. He drew a conveyance in absolute form to Mrs. Hawkins that was registered in the registry office, and no one who might purchase from Mrs. Hawkins or did purchase from her would know anything of any other document. At the same time he drew what he calls a deed poll, which he says he represented to Mr. Hawkins as a protection to him so that she could not part with the property during his lifetime; and that, if she failed in leaving the property to him on her death should she predecease him, an agreement to do so could be enforced in the courts. Unfortunately, I cannot believe that Mr. Currie ever thought that this document conferred any such rights. The document was fresh in his mind when he was giving Mr. Hawkins the instructions, he is the author of the language in the document, and the document is carefully worded just to avoid any such effect. After reciting the conveyance to the defendant, the first sentence reads:

“NOW, THEREFORE, KNOW YE that I, LETTIE PEARL HAWKINS, of the City of Toronto, in the County of York, wife of the said William Hawkins, in consideration of the said conveyance to me do hereby covenant, promise and agree with the said William

Hawkins that in the event of my predeceasing him I will, by Last Will and Testament, give, devise and/or bequeath unto the said William Hawkins whatever right, title and/or interest I may, at the time of my predecease, have in the said lands and premises and/or in the proceeds thereof."

That language clearly contemplated a right to sell the property during the lifetime of Mr. Hawkins, and it clearly contemplated a right of parting with the proceeds before her death, and that she would be able to sell the property, part with the proceeds, and leave Hawkins completely destitute, should she predecease him. Then it continues:

"It being understood, however, that during the joint lives of the said William Hawkins and myself, it is permitted to me to use and/or apply the said lands and premises and/or the proceeds therefrom or any part or parts thereof to the maintenance, support and comfort of the said William Hawkins and myself in such manner, at such times, *and to such extent as I, in my absolute and uncontrolled discretion, may deem reasonable or expedient; but it being further understood that subject only to the foregoing the above mentioned conveyance of the said lands and premises is made to be absolutely for my sole and only use forever.*" (The italics are mine.)

The document is drawn in the clearest language to exclude Mr. Hawkins from any suggestion of an enforceable right or that she may have held the property in trust for him. It seems to me it is drawn more with the latter idea than as any protection to Mr. Hawkins. Counsel for the defendant made no serious argument to support this transfer. Mr. Currie in the witness-box admitted that the document did not afford Mr. Hawkins the protection that he said it afforded him. Well, that, unfortunately, cannot be disposed of in this case by any finding of mistake or unfortunate circumstance. It is fraud. Mr. Hawkins was told that he was disposing of his property on certain conditions, while in fact the documents that were prepared as part and parcel of the whole transaction were quite otherwise. A Court of equity should have no hesitation in holding that misrepresentation as to the nature and effect of the documents was made with knowledge that they were false. That is fraud.

The whole character of the transaction as outlined by the defendant in the witness box, as she says she outlined it to her



husband, was consistent with the idea that it was some sort of settlement whereby they should have a home for their lives. I do not think, in view of the medical evidence, it was possible for Mr. Hawkins to have comprehended the nature of this transaction in any detail and its effect on him. We are dealing with gifts *inter vivos*, and the case must be dealt with as if the deceased were himself suing to have them set aside. There was the statement by the defendant that her heirs were to have nothing to do with the home; she couples that with the fact that she would have a home for herself. That is certainly an unsatisfactory explanation of the real effect of the transaction.

At this same time a transfer of the two insurance policies in the Montreal Life Insurance Company was drawn; in them the defendant was named as the beneficiary and the interest of Kathleen Rosalie Brydon was revoked. The transfer that was drawn for the insurance company was absolute in form, but Mr. Currie, for reasons that have been explained in evidence and do not appear on the document, drew a transfer for value to Mrs. Hawkins. Mr. Currie was asked what the consideration was as stated in the document, and he said, "Well, that was largely fictitious", and then he sought to support it in a sort of argumentative way by deductions to be drawn from the pre-nuptial agreement. If that is the consideration on which it was based, my findings have already disposed of that. It again is a document that shocks the conscience of a Court of equity, having regard to what the parties all owed to a man in the condition of Mr. Hawkins. There was no consideration of value; Mr. Currie was right in his first statement, that it was fictitious; but it was sought to make it appear that way so as to exclude the possibility of the insurance company accepting a transfer of the insurance in favour of a preferred beneficiary. The purpose of it undoubtedly was to make it appear to be a transfer for value, when in fact it was not.

In March 1947 Mr. Hawkins suffered a slight stroke and had an attack of pneumonia; one Dr. Jackson was called in. In August 1947 he was taken ill with what the doctor, according to the defendant, thought was ptomaine poisoning. On the 8th August a transfer of the interest of Mrs. Brydon in the Metropolitan policy was made in favour of the defendant; and on the 9th August, in the morning, Mr. Hawkins died.

The defendant's story of the transfer of the Metropolitan insurance is that for a few days before Mr. Hawkins's death she had been making enquiries about the insurance and how it stood; that she went down to the agent, who had been making enquiries from the head office; that the day before Mr. Hawkins's death she found that the insurance was in Mrs. Brydon's name; that they had some discussion at the office of the insurance agent, and a Mr. Smith said he was going up that way and would call in and have a transfer to her signed. Mr. Smith called, and a transfer is said to have been signed. We have no evidence that it was signed; Mr. Smith was not called as a witness. We have no evidence as to whether the document was read over to Mr. Hawkins. He was evidently very ill at the time; the son said he had seen him on Thursday and he was very sick. What took place in Hawkins's home that night we do not know, except that a document is presented that purports to have Hawkins's signature on it.

On the 22nd August the house on Thelma Avenue was sold for \$10,000 by the defendant, without consulting the family. The proceeds were invested in a house in Stratford, together with part or all of the proceeds of the two insurance policies realized on.

On the 15th September 1948 the examination for discovery in these actions was held. The actions had been commenced on the 30th October 1947. On the 21st September, six days following the examination for discovery, the house in Stratford was advertised for sale by auction, to be sold on the 28th September, and the house was sold at auction at that time, but the completion of the sale was prevented by the institution of an action and the filing of a *lis pendens*.

On these findings of fact, it now remains to be considered what law should be applied.

A general statement of the law that is a good preface to the consideration of the matter is set out in Story on Equity, 3rd Eng. ed. 1920, at p. 128, s. 308:

"It is undoubtedly true, as has been said, that it is not upon the feelings which a delicate and honourable man must experience, nor upon any notion of discretion, to prevent a voluntary gift or other act of a man, whereby he strips himself of his property, that courts of equity have deemed themselves at

liberty to interpose in cases of this sort. They do not sit, or affect to sit, in judgment upon cases, as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interest, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of equity will not, therefore, arrest or set aside an act or contract merely because a man of more honour would not have entered into it. There must be some relation between the parties, which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But, when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance, for it is founded in a breach of confidence. The general principle, which governs in all cases of this sort, is, that if a confidence is reposed, and that confidence is abused, courts of equity will grant relief."

In 15 Halsbury, 2nd ed. 1934, at p. 272, para. 491, there is a statement of two principles affecting the onus:

"There are two classes of cases in which gifts are set aside by courts of equity on the ground of undue influence; first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the gift unless it is proved that it was in fact the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and justify the Court in holding that the gift was the result of the free exercise of the donor's will. . . . In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent relations which



existed between the parties and the influence arising therefrom from being abused."

There are two classes of case that come within this doctrine. The first is the class where, by reason of the very nature of the relationship, the position of confidence is established without more than the proof of the nature of the relationship, such as solicitor and client, parent and child, and a number of others. In fact the limits of this class have not yet been defined; but there is the other class, where by proof of certain facts the confidential position of the parties is established and undue inference is inferred; in such cases the onus passes to the donee to establish the voluntary character of the gift and that the gift was one made by the free exercise of the will of the donor. It is not every fiduciary relationship that justifies the Court in acting, where the person standing in a fiduciary position has received a bounty.

In *In re Coomber; Coomber v. Coomber*, [1911] 1 Ch. 723, an assignment of a lease of certain ale stores by a mother to her son was attacked, and the facts showed that the deceased had desired the son to have the lease, and that the son undoubtedly had been managing the ale stores for his mother for a few months. Lord Cozens-Hardy M.R., at pp. 726-7, says:

"I do not think it is true to say that any confidential relation between donor and donee is sufficient to set up a presumption against the validity of the gift; or, in other words, that it is for the donee under the gift to establish that all such precautions have been taken as would admittedly be necessary in the case of some confidential relations. There are confidential relations in which there is a presumption of undue influence. Take the common case (I say the common case because it is one of which the books are full) of solicitor and client. A solicitor cannot, in ordinary circumstances, take a gift from his client in a matter in which he is the solicitor because there is from that relationship in itself a presumption of undue influence . . . Another instance is, of course, where a young person, whether male or female, immediately after attaining twenty-one, makes a gift to a parent or a person standing in loco parentis. When a gift is made under such circumstances, there is a presumption of undue influence which requires something to rebut it; but to apply that to every fiduciary relation and every relation of

confidence is, I venture to think, not according to any authority and distinctly contrary to principle. So far from its being warranted by any authority it seems to me to be as plainly negatived by what Lord Eldon said in *Harris v. Tremenhare* [(1808), 15 Ves. 34, 33 E.R. 668] as it is possible to imagine. That was a case of an agent or attorney; and after saying that certain voluntary leases which had been granted to the agent were pure gifts, he continues: 'With regard to those leases, I am not entrusted with a jurisdiction to say, what a delicate, or a prudent, consideration would have suggested; but upon reasons of public policy, though I must dismiss the bill as to those two leases also, I shall dismiss it as to them without costs. I cannot find any decision, authorizing me to say, that the defendant should not have taken these leases, as of the pure gift of his employer. I am quite ready to say, that, if I could find in the answer or the evidence [and this is the important part of this judgment] the slightest hint, that the defendant laid before the testator any account of the value of the premises, that was not perfectly accurate, that would induce me to set them aside, whatever the parties intend, upon the general ground, that the principal never would be safe, if the agent could take a gift from him upon a representation, that was not most accurate and precise. There is no evidence of misrepresentation, circumvention, or any thing, improperly leading the testator to make these leases; that they were not the spontaneous fruit of his own generosity; not weighing the value or amount of the consideration, that should have been given, if it had been the subject of barter.' Every word of that sentence seems to me to apply absolutely to the present case."

At p. 729, Fletcher Moulton L.J. said: "The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them."

The last sentence must always be borne in mind in considering these cases.

In *Smith v. Kay* (1859), 7 H.L. Cas. 750 at 770, 11 E.R. 299, Lord Cranworth, in referring to the particular case under con-

sideration, says: "In my opinion, although this bill is framed upon the ground of this supposed fraud, the circumstances of the case as now proved make it abundantly clear that this fraud was totally immaterial in order to entitle the Plaintiff to set aside this bond, upon the ordinary principle of the Court, which protects an infant, or any other person, who is, from the relations which have subsisted between him and another person, under the influence, as it is called, of that other. My Lords, there is, I take it, no branch of the jurisdiction of the Court of Chancery which it is more ready to exercise than that which protects infants and persons in a situation of dependance, as it were, upon others, from being imposed upon by those upon whom they are so dependant."

I quote those words from the judgment of Lord Cranworth as outlining a broad declaration of an equitable principle that is of importance in considering the arguments that have been addressed to the Court in this case. There Lord Cranworth is not limiting the scope of the application of the doctrine to any particular relationship. Of course, one must always bear in mind that in every case all the facts of the case are to be taken into consideration.

The law was very extensively considered in *Vanzant v. Coates* (1917), 40 O.L.R. 556, 39 D.L.R. 485, and it does not assist us to go into all the cases that are therein discussed. However, for the purpose of dealing with the facts of the case that I have before me, I think it well to recall some of the language of Ferguson J.A. at pp. 561-2 (the italics are mine):

"In the case at bar it is not the relationship of mother and daughter that casts the onus stated by the rule on the plaintiff, but the circumstances of age, infirmity, and dependency of the donor, and the position of influence occupied by the donee, and her acts in procuring the drawing and execution of the deed, and the consequent complete change of the well-understood and defined purpose in reference to the disposition of the donor's property. It is in these circumstances, and in that it has not been found that there was no undue influence, that I think the case at bar is distinguishable from such cases as *In re Coomber* [and others that are mentioned]. The underlying equitable rule seems to be, that *if the party is in a situation in which he is not a free agent, and is not equal to protecting himself* a Court



of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so, because of their position. As I see it, the question here is not, does the relationship of mother and daughter raise a presumption of undue influence? but, do the circumstances adduced in evidence shew that the plaintiff occupied a position of influence and that the deceased was not a free agent, equal to protecting herself against the plaintiff's influence or domination, or that the plaintiff benefited or profited by her position? . . .

"*Griffiths v. Robins* [(1818), 3 Madd. 191, 56 E.R. 480] was a case of an aged female, stricken with blindness, or nearly so, and reduced by her age and infirmities to a condition of entire dependance upon a niece and the husband of that niece, to whom the gift was made; and there, Sir John Leach, V.-C., held that the persons taking the gift were bound to shew that the gift was the result of the free will of the donor *and effected by the intervention of some indifferent person*. . . .

"In *Billage v. Southee* (1852), 9 Hare 534 [68 E.R. 623], Turner V.-C. at p. 540, says: 'No part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction of the Court cannot be too freely applied, either as to the persons between whom, or the circumstances in which it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustees and *cestui que trust*—guardian and ward—attorney and client—surgeon and patient—to be merely instances of the application of the principle.' " That again is very broad language, and language that has been applied in many cases.

At p. 566 the learned justice refers to *Mason v. Seney* (1865), 11 Gr. 447, to which I shall refer later, and makes this quotation with respect to the onus that is on the defendants if the

case establishes that the donee stood in a fiduciary relationship to the donor:

"It (is) necessary for the defendants to establish by clear evidence that the old people really did make the deeds which the defendants claim under; that their nature and effect were fully and truly explained; that they, the donors, perfectly understood them; that they were made alive, by explanation and advice, to the effect, and consequences to themselves, of executing them; and that the deeds were willing acts on their part, and not obtained by the exercise of any of that influence which (the son's) position put it in his power to employ."

In *Mason v. Seney*, *supra*, Mowat V.C. said, at pp. 449-50:

"The doctrine is more shortly expressed by the same learned judge, in the subsequent case of *Walker v. Smith* [(1861), 29 Beav. 394, 54 E.R. 680]: 'There are always two points to be considered in these cases. First, whether the donor really made the gift; and, secondly, whether the influence of the donee, or recipient of the bounty, was improperly exercised on the donor, to induce the donor to make the gift in question. The burthen of proof of the first always lies on the recipient of the bounty, to shew that the gift was intended to be given. . . . The strict burthen of proof lies on the recipient of the bounty. He must prove every point of the case, not only the transfer, but that the transfer was meant to be made to him beneficially.'

"As to the kind of proof necessary to establish a deed of gift, even where there was no undue influence, the Master of the Rolls observed, in the same case: 'I am of opinion that in all these cases, you must not take into account the evidence of the recipient himself; the gift must be established by separate and independent evidence.'

"In the passage quoted from *Hoghton v. Hoghton* [(1852), 15 Beav. 278, 51 E.R. 545], the court mentioned some of the relationships which have been recognized in equity as enabling one person to exercise undue influence over another. Those so mentioned are but examples, as the same learned judge has observed on many occasions. In the case of *Hobday v. Peters* [(1860), 28 Beav. 349, 54 E.R. 400], he said: 'I think the evil would be very considerable, and the rule of the court frittered away by technicality, if it were held, that this particular relation must be one which the court designates by a particular

name, such as that of trustee and *cestui que trust*, guardian and ward, solicitor and client, or physician and patient. I said, in *Cooke v. Lamotte* [(1851), 15 Beav. 234, 51 E.R. 527], "Lord Cottenham considered that it extended to every case in which a person obtains by donation a benefit from another, to the prejudice of that other person, and to his own advancement; and that it is essential, in every such case, if the transaction should be afterwards questioned, that he should prove that the donor voluntarily and deliberately performed the act knowing its nature and effect." " "

The principles as expressed in that language may be taken to be to some extent circumscribed in later cases, but with that, for the purposes of the case before me, we are not concerned.

Mr. Black argues very strongly that all this body of law that I have been discussing does not apply to the relationship of husband and wife, and that there are some other principles that do apply. He argues that in every case between a husband and wife undue influence must be specifically proved; and that it is not possible to establish that a confidential relationship existed by proving a course of conduct between the husband and the wife. That argument would rule out all relationships where a wife might be perfectly helpless even to refuse any request from her husband, due to age or physical or mental infirmity. I cannot believe that that is consistent with the equitable doctrines that I have been discussing, and I have not been able to find any such limitation on it.

Mr. Black relies on *Bank of Montreal v. Stuart et al.*, [1911] A.C. 120, C.R. [1911] A.C. 1. To understand that judgment in this respect one must read the case that gave rise to the discussion in the judgment, *Cox et al. v. Adams* (1904), 35 S.C.R. 393. There the Supreme Court had laid down, or, as said by Lord Macnaghten, had been said to have laid down, the rule that the mere relationship of husband and wife, without proof of anything more, was enough to make applicable the equitable doctrine applying to the person standing in the fiduciary relationship to another. I refer to the doctrine of *Huguenin v. Baseley* (1807), 14 Ves. 273, 33 E.R. 526. At p. 126 of the report of Lord Macnaghten's judgment *Cox et al. v. Adams* is discussed, and in referring to the judgment of the Chief Justice of Canada he says:



"The learned Chief Justice also thought that Mrs. Stuart was entitled to relief, but he based his judgment on the case of *Cox v. Adams*, in the Supreme Court of Canada, which decided, or was supposed to have decided, that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shewn to have had independent advice. As the Court was equally divided, the judgment of the Court below was affirmed. . . .

"Their Lordships do not think that the doctrine supposed to be laid down in *Cox v. Adams* can be supported, and in fact no attempt was made to support it by the learned counsel at the Bar who appeared for Mrs. Stuart. On the other hand, their Lordships are compelled to take a view of the facts and circumstances of the case very different from that which commended itself to the trial judge and the learned judges who agreed with him."

At p. 137 Lord Macnaghten says: "Their Lordships accept the law as laid down by Parker V.-C. in *Nedby v. Nedby* [(1852), 5 DeG. & Sm. 377, 64 E.R. 1161], to the effect that in the case of husband and wife the burden of proving undue influence lies upon those who allege it."

I do not think that Lord Macnaghten was intending to put the relationship of husband and wife further beyond the control of the Courts of Chancery than the relationship of strangers. I interpret that judgment to mean that there must be such proof as would establish a case if they were strangers. The quality of the evidence and the application of the evidence may vary as between husband and wife and strangers, and it may vary a great deal between certain husbands and certain wives, depending to a great extent on the actual relationship that existed prior to and up to the deed in question.

The matter was discussed again in the Judicial Committee in *MacKenzie v. Royal Bank of Canada*, [1934] A.C. 468, [1934] 4 D.L.R. 1, [1934] 2 W.W.R. 620. At p. 475 Lord Atkin says:

"The view taken by the Appellate Division that a wife does not fall within the class of 'protected' persons in respect of whom in certain relationships there is a presumption of undue influence, is clearly right, and is supported by the authorities cited in their judgment."

I pause there only for a moment to emphasize that Lord Atkin is using the words "the class of 'protected' persons". That

means that the husband and wife do not come within that class, such as solicitor and client, guardian and ward, child and parent, etc., where the mere proof of being a member of the class raises a presumption of undue influence. He goes on:

"It may be true that in some cases it is easy for the wife to discharge the onus which lies on her as on every one else outside the protected class to show that a particular contract was, in fact, procured by the undue influence of her husband."

That indicates to me that Lord Atkin was placing the husband and wife in exactly the same position as persons without the "protected" class. As I say, in considering the evidence in a particular case the actual relationship of the husband and wife must always be borne in mind.

In *Howes v. Bishop et ux.*, [1909] 2 K.B. 390, Lord Alverstone says, at p. 395, quoting from *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462: "In equity persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question." And he goes on to say:

"It is true that in that passage the learned judge mentioned husband and wife as in the same category as the other relations which he named: he was there referring to the equitable doctrine, and placed husband and wife in the same position as other relations to which that doctrine undoubtedly applies; but it is no part of his decision in the case, and must be considered as a dictum introduced by him while enunciating the general principle. There is, however, an authority which negatives the accuracy of the generality of that statement and also negatives the broad argument on behalf of the present appellant. In *Barron v. Willis* [[1899] 2 Ch. 578], Cozens-Hardy J. said: 'It is also settled by authority which binds me, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin v. Baseley*, [*supra*], applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid. The onus probandi lies on the party who impugns the instrument, and not on the party who supports it. This was clearly decided by Sir James Parker in 1852 in *Nedby v. Nedby*,

[*supra*], and it accords with what Lord Hardwicke said in *Grigby v. Cox* [(1750), 1 Ves. Sr. 517, 27 E.R. 1178]. Whether that is right or wrong, it is an authoritative expression of opinion by a learned judge of great experience in that branch of the law, and it is far more weighty than the general statement of Lord Penzance. That view derives support from other authorities. In *Turnbull & Co. v. Duval* [[1902] A.C. 429] Lord Lindley, in delivering the judgment of the Privy Council, said: 'Their Lordships are of opinion that it is quite impossible to uphold the security given by Mrs. Duval. It is open to the double objection of having been obtained by a trustee from his cestui que trust by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it.' For this reason I think that there may be circumstances in which the equitable doctrine that the onus of proof rests on the person supporting the document which creates a gift inter vivos would apply to the relationship of husband and wife, but I am not prepared to assent to the contention that the relationship necessarily comes within the application of the doctrine; on this point I think that the view of Cozens-Hardy J. in *Barron v. Willis* was quite right."

This case is one that was relied upon in the Ontario Court of Appeal in *MacKenzie v. Royal Bank of Canada*. At p. 399 Lord Justice Fletcher Moulton says:

"I am of opinion that the ruling in *Barron v. Willis* is correct and that the relation of husband and wife is not necessarily brought within the equitable principle laid down in *Huguenin v. Baseley*; but it is not necessary in the present case to decide any such general proposition."

It is quite clear there that the only question that was being considered was whether the relationship necessarily brought the case within the doctrine of *Huguenin v. Baseley, supra*.

Mr. Black relies on *Hopkins v. Hopkins* (1900), 27 O.A.R. 658. His argument is that if the doctrine of *Huguenin v. Baseley* applied, and if there were a confidential relationship between the husband and the wife requiring its application, that would have



been the end of the case and it would not have been necessary to discuss the question whether or not there actually was undue influence. I cannot see that the facts in that case lay any foundation for that argument. The peculiar relationship that existed between the husband and wife in *Hopkins v. Hopkins* was, one would gather from the facts, that there was no confidence existing between them at all. The relationship was obviously so bitter that the Court felt that it went a long way to show that there must actually have been undue influence or the husband would not have been persuaded to make the gift.

Underlying all these cases, and the argument in them all, is the suggestion that the husband was in a position to dominate the wife, and that by reason of his being in that position there should be, by proof of nothing else than the relationship of husband and wife, a shifting of the onus to show that the husband, the donee, had not exercised undue influence. None of them deals with the question that I have here to consider—that is, whether a husband who, by reason of the infirmity that was upon him, was not able of his own initiative to communicate his will to others or to protect himself by discussion with others, by getting advice and by making known to others those things that might concern him in parting with his property, should be taken to stand in such a relation to his wife that the equitable principles that I have outlined earlier in my judgment should be made to apply.

My conclusion is, and I find as a fact, that throughout the whole relationship that existed between the parties from the time of their marriage down to the day before the death of the husband, the husband's position was such that the equitable doctrine outlined in *Vanzant v. Coates*, *supra*, applied.

Mr. Black argues that, even though that position may be established, the evidence is such as to rebut the onus that lies on his client. In *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127 at 135, Lord Hailsham lays down the standard of proof that the donee must meet in these cases;

“It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so com-

pletely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor."

Now, where in this evidence do we find these requirements met? Mr. Currie was obviously not in a position to give advice with knowledge of all relevant circumstances, because he could not enquire from Mr. Hawkins, the donor, what were the relevant circumstances; he could not enquire what moved his mind to make these gifts; he made no enquiry about Mr. Hawkins's attitude toward his family except in the last interview, when he asked Mr. Hawkins if he would like to be rid of his wife and he nodded "yes"; and he asked him if his wife left him would Kathleen come and look after him, to which Mr. Hawkins nodded "yes" with a smile. There was no one with knowledge of the relevant circumstances other than the defendant who was at any time throughout all these transactions in touch with Mr. Hawkins, let alone in a position to advise him.

It is argued that even though the last transfer may be bad, the first one should stand, and that by virtue of it the property passed to the defendant on the death of Mr. Hawkins. I do not think that argument can prevail, for two reasons. One reason is that, as I stated earlier, the whole scheme as ultimately accomplished was part and parcel of a plan laid by the defendant to get absolute control over all the assets of the deceased man. She entered upon the scheme the day after they were married, and persisted in it until she accomplished it, by documents that

certainly, in the view of a Court of equity, were obtained by fraudulent misrepresentation.

I do not think the first deed can be upheld on the other grounds that I have stated—that is, that the confidential position existed and that there was no one at that time who was advising Mr. Hawkins with knowledge of all the relevant circumstances. The standards laid down by Lord Hailsham are not met in the evidence in this case, and I cannot help but feel that Mr. Currie was more conscious of protecting Mrs. Hawkins against a possible attack on these transactions than he was of protecting Mr. Hawkins in his personal capacity in the position in which he was putting himself. This may have been due to Mr. Currie's lack of understanding of the law, but the defendant cannot profit by that.

There is another aspect—and I do not need to base my judgment on it—and that is that the defendant, having influenced Mr. Hawkins in his lifetime by a fraudulent representation as to the nature and character of the documents that were being executed when the last transfer was made, cannot be heard to say: "It may be quite true that the last transfer cannot stand, but that leaves me in the position that the property passed to me by virtue of the earlier transfer." We do not know, we cannot conjecture, what Mr. Hawkins might have done had he had it in his power to deal with his share of the property as it stood before the last transfer. Had those conditions continued until his death, he might well have conveyed his interest to his daughter or his son or to all his children. He might very well have seen fit, under proper advice, to destroy the right of survival. I feel the equitable doctrine that no one can take advantage of his own wrong applies, but I do not have to make that the basis of my judgment.

Even if I am wrong in the application of the law as I have discussed it, and the onus is on the plaintiff to prove undue influence, I think the plaintiff should succeed. What is undue influence must vary with the circumstances of each case; the position of the parties, the power of the donor to comprehend the transaction in all its aspects as it may affect him, together with his capacity and power of protecting himself, must be taken into consideration. The effect of any influence on the donor is an important matter for consideration. Here we have



a man almost completely shut off from the world, as far as communication is concerned. He could in some measure understand what was said to him, but, according to Dr. McBroom's evidence (which, as I say, I have accepted), it would be impossible for anyone communicating with him to know whether he understood and appreciated the nature and character of a legal document. He could not ask a question by way of securing explanation of anything that troubled him; he could not express an idea or a wish of any kind. It was said by Mr. Currie that he could not read, and I think we must take it, with respect to these legal documents, that no presumption whatever arises from the fact that he signed them. He was only in a position to answer "yes" or "no" to the ideas of others that were expressed to him. It would seem to me that any influence exercised on this man in that position, so as to denude him of his property and leave him completely penniless had the donee chosen to leave him, would be undue influence unless it were clearly demonstrated that that influence was exercised with the greatest care and restraint. I cannot see, on the evidence, how anyone could have any way of knowing whether the deceased had power to comprehend the nature of these transactions and how they affected his legal rights so that he might protect himself.

But the evidence in this case goes far beyond mere influence. The defendant admits, in her examination for discovery and at the trial, that she was asserting her rights as she thought them to be, in order to get that to which she thought she was entitled. That was to have all the assets of the deceased under her own control. She thought care should be taken to prevent him from dealing in any way with those assets, should he, after the transfers, have any advice that would make him feel that he ought to deal with them to the detriment of the defendant. The untruthful evidence given at the trial, designed to set up this ante-nuptial agreement, which did not in my view exist, serves only to indicate the methods that the defendant was willing to adopt in order to gain her ends. But one does not need to rely on inferences. The persuasion resorted to under the circumstances of this particular case is quite enough, in my mind, having regard to the utterly defenceless position in which the deceased was, to establish proof of undue influence within the principles followed in a court of equity.

I have referred to what Mr. Currie said was a somewhat fictitious statement of the consideration in the alleged transfer of the insurance for value. The fact that a fictitious consideration was expressed in one of the documents that it is now sought to uphold is of some importance, and I refer to what was said in *Mason v. Seney, supra*.

Some argument was based on the question of laches. I do not think that in the circumstances of this case that can be taken into consideration. If it were proved that at any time the deceased had full knowledge of all that he had done, and if it were shown that he, in possession of that knowledge, had taken no steps to make any change after having been fully advised, that would be important. Throughout the whole time he was obviously under the domination and direction of the defendant, with only intermittent contacts with his family, and then he was not in any position to tell the family what he had done or to explain to them why he had done it or to consult with them about whether he ought to have done it or not. I do not think the question of laches arises here.

For these reasons I have come to the conclusion that it has not been shown that the deceased made these transfers of insurance and executed these deeds under such circumstances that their nature and effect were fully and truly explained, so that the deceased perfectly understood them and was made alive by explanation and advice to the effect and consequences to himself in executing them. Nor has it been shown that the deeds were willing acts on his part and not obtained by the exercise of any power or influence which the defendant was in a position to exercise over him. On the other hand, I think the facts fully justify the finding that in the circumstances the defendant exercised an influence that was undue and ought not to have been exercised.

Judgment will therefore go for the plaintiff in all three cases.

The transfer of the insurance policies in the Montreal Life Insurance Company, nos. 58589 and 59444, dated the 14th February 1947, purporting to revoke the interest of Kathleen Rosalie Brydon, will be set aside and declared null and void and of no effect, together with the instrument of the same date executed under seal and purporting to be a transfer for value. Judgment will go against the defendant for \$2,000, together with

interest at 5 per cent. from the date on which the money was paid to her.

Judgment will go in favour of the plaintiff in the second action, with respect to the Metropolitan Life Insurance Company policy no. 3198667-A, setting aside the transfer dated the 8th August 1947, and directing that the sum of \$2,000 paid into court be paid out to the plaintiff with accrued interest.

Judgment will go in favour of the plaintiff in the third action, brought to set aside the two conveyances, setting aside the deed dated the 27th August 1945, made by William Hawkins in favour of William Hawkins and Lettie Pearl Hawkins as joint tenants, and registered as no. 16997 for the village of Forest Hill, and setting aside the deed dated the 14th February 1947 from William Hawkins to Lettie Pearl Hawkins, registered the 14th February 1947 as no. 18797, Forest Hill. The so-called deed poll does not require to be dealt with, as the deceased Hawkins was not a party to it. The plaintiff is entitled to judgment for \$10,000, the sale price of the property, together with interest from the date the money was received.

I think the proper disposition of costs is that there should be one set of costs with respect to the two actions involving the insurance policies. I cannot see any reason why these two cases could not have been dealt with in one action and by the issue of one writ. The so-called class action, which later became the action brought by the estate, had to be brought, or at any rate the parties were justified in bringing a separate action by reason of the interests that were involved, and I give the costs of that action and one set of costs in respect of the other two actions down to trial. The actions have all been tried together, and there should be only one set of costs of the trial.

That disposes of the cases that I have tried. There remains to be considered the disposition of costs in the action brought with respect to the wills. [After some discussion with counsel, his Lordship awarded to the plaintiff the costs of that action up to trial, but neither a counsel fee nor a fee for preparation for trial.]

*Judgment accordingly.*

*Solicitor for the plaintiff: Ernest M. Lee, Toronto.*

*Solicitor for the defendant: E. G. Black, Toronto.*



[GALE J.]

**Re Robertson.**

*Executors — Compensation — Powers of Court to Award Compensation — Express Provision in Will — Successor Trustees — Waiver of Right to Compensation — The Trustee Act, R.S.O. 1937, c. 165, s. 60.*

Where a will contains an express provision as to the amount of compensation to be paid to executors and trustees thereunder, that provision constitutes an absolute limitation upon the allowance which may be made. The Court will not consider the reasonableness of the amount provided for, nor can it be successfully argued that trustees are in all cases to receive fair and reasonable allowance for their trouble, and that if the document creating the trust fixes an allowance which is not fair and reasonable the Court is entitled to disregard it. *Williams v. Roy et al.* (1885), 9 O.R. 534; *Re Holmes* (1916), 10 O.W.N. 354; *Re McDonagh* (1920), 18 O.W.N. 154, applied; *Denison v. Denison* (1870), 17 Gr. 306; *Kennedy v. Pingle* (1879), 27 Gr. 305; *Eastern Trust Co. v. Keith et al.* (1923), 56 N.S.R. 355, discussed. The only way in which an executor can recover any compensation, in the absence of a special agreement or stipulation with the testator, is by bringing himself within s. 60 of The Trustee Act, and where there is a provision in the will fixing the amount of compensation subs. 5 operates to exclude the operation of the other parts of s. 60.

This rule, however, does not apply to successor trustees, appointed under the terms of the will, if the provision as to compensation is not so worded as to apply to them. They are entitled to claim a fair and reasonable allowance under s. 60 (1).

Although the Courts in Ontario should probably adopt and apply the rules laid down in the United States of America, and summarized in 65 Corpus Juris, p. 913, para. 810, as to circumstances in which an executor or trustee will be deemed by his conduct to have waived his right to claim compensation, mere resignation from office, without formal discharge by the Court and before the time for final distribution has arrived, will not constitute such waiver.

A MOTION by the executors and trustees of the estate of John Ross Robertson, deceased, for the opinion, advice and direction of the Court as to the payment of compensation. The terms of the will are outlined in *Re Robertson*, [1948] O.R. 764, [1948] 4 D.L.R. 606.

15th March 1949. The motion was heard by GALE J. in Weekly Court at Toronto.

*J. L. Stewart*, for the applicants.

*A. W. Roebuck, K.C.*, and *Z. R. B. Lash*, for four of the executors and trustees in their personal capacities.

*A. S. Pattillo*, for the trustees for The Hospital for Sick Children.

*J. G. Middleton, K.C.*, for The Hospital for Sick Children.

*G. T. Walsh, K.C.*, *J. R. Rumball, K.C.* and *R. H. Sankey, K.C.* for other charities, contingent residuary beneficiaries.

*M. C. Cameron, K.C.*, *J. Shirley Denison, K.C.*, *R. I. Ferguson, K.C.* and *J. R. Robinson, K.C.*, for the personal representatives of deceased executors and trustees.

*D. M. Heddle*, for the executrix of John Sinclair Robertson, a son of the testator.

7th May 1949. GALE J.:— Clauses 3 and 4 of the last will and testament of the late John Ross Robertson, who died on the 31st May 1918, read as follows:

“3. I hereby appoint my wife, Jessie Elizabeth Robertson; my son, Irving Earle Robertson; my nephew, Douglas Sinclair Robertson; and John Robinson Robinson, Editor of The Evening Telegram; and Alfred Taylor Chadwick, Business Manager of the same, all of the City of Toronto, to be executors and trustees of this my will, and I direct that there be paid to each of my executors and trustees other than Alfred Taylor Chadwick the sum of one hundred dollars, and not more, as and for her and their remuneration as executors and trustees, and to the said Chadwick the sum of five hundred dollars per annum, and not more, as his remuneration as executor and trustee. On account of his delicate health, I desire to spare my son, John Sinclair Robertson, the burden of executorship, and for this reason alone I have not appointed him an executor.

“4. If any one or more of my executors or trustees, either original or substituted, shall die, or desire to be discharged, or shall refuse or become unfit or incapable to act in the trusts, then as often as the occasion arises I appoint such person or persons not being any relative or connection or my wife or mine by blood or marriage as my wife, Jessie Elizabeth Robertson, shall nominate, and after the death of my wife I direct that such new trustees or executors shall be nominated and appointed by the surviving executors or trustees, executor or trustee, as the case may be, this power to be exercised at the time of my death if the occasion therefor arises, it being my will and intention that there shall always be five executors or trustees of this my will.”

Letters probate of the will were issued out of the Surrogate Court of the County of York on the 26th July 1918 to those named in clause 3 as executors and trustees. Two of those persons, Douglas Sinclair Robertson and Alfred Taylor Chadwick, have served continuously; John Robinson Robinson acted to the date of his death, 28th September 1938; Irving Earle Robertson acted to the date of his death on 4th January 1932, and Jessie Elizabeth Robertson (subsequently Cameron), the widow of the testator, served until 11th July 1947, the date of her death.

On 7th February 1929 James Parker, K.C. (as he then was) was nominated by the widow of the deceased, pursuant to clause 4 of the will, to fill the vacancy created by the death of John Robinson Robinson. Judge Parker, as he subsequently became, resigned from office on 28th November 1934. On 13th January 1932 Charles Oswald Knowles was nominated by the widow to fill the vacancy caused by the death of Irving Earle Robertson, and he has continued in office to this date. Charles Henry Jeremiah Snider was appointed by her on 28th November 1934, following Judge Parker's resignation, and he has continued to act up to the present time. On 16th July 1947, a few days after the death of the widow, Charles Patrick McTague was appointed as a trustee by the then surviving executors and trustees. Accordingly, at the present time the executors or trustees of the estate consist of two of the persons originally named in clause 3 of the will, and the three appointed under clause 4 of the will.

In the first instance the present trustees came to the Court for determination of the question as to whether any of them are entitled to any compensation or allowance for their care, pains and trouble and time expended in and about the estate in addition to the amounts mentioned in clause 3 of the will, and they also asked the Court to fix the amount of such additional compensation or allowance in the event that they were held entitled thereto. When the matter thus came on it occurred to me that the scope of the enquiry was too narrow and I suggested that the first question be changed so that the two questions would then read as follows:

“(1) Are the applicants and the other persons who have at any time been executors and/or trustees of the estate of the said John Ross Robertson, deceased, or any of them, entitled to any compensation or allowance for their care, pains and trouble and their time expended in and about the estate having regard in particular in the case of the applicants to the sale by the applicants of the business of The Evening Telegram?

“(2) If the answer to question (1) is in the affirmative, what is the amount of the compensation or allowance to which they are entitled?”

I also directed that copies of the order and of the other material be served upon the personal representatives of those persons



who at one time acted as executors or trustees but who are now deceased.

Those further services were made, but at the opening of the substantive argument counsel for the applicants asked leave to withdraw the second question. Such leave was granted since it was obvious that consideration of the procedure for determining the quantum of compensation might better be deferred until it was determined whether there existed any right to such additional compensation.

Mention should also be made of the fact that in addition to the appearances noted above the Public Trustee was served with notice of the motion, but he indicated that he did not deem it necessary to appear. I should also say that Mr. Pattillo was appointed to represent all beneficiaries who are still in receipt of annuities.

Generally speaking, those who would be entitled to compensation are supporting the view that the Court may allow amounts in addition to those mentioned in clause 3 of the will. Mr. Pattillo and Mr. Heddle oppose that contention on behalf of their respective clients. Counsel representing The Hospital for Sick Children, The Hospital for Incurables, The Infants' Home and Infirmary and the Masons take the position that by reason of the terms of clause 22 of the will the parties for whom they appear are precluded from presenting any views upon the matters raised by the notice of motion.

Of all the above-mentioned executors or trustees Alfred Taylor Chadwick is the only one who has received any compensation. He has been paid \$500 per annum from 31st May 1918, but the others have received nothing. In this connection, however, it should be mentioned that for some part of the period during which Judge Parker served he was engaged as a solicitor to the estate and was paid proper fees for his legal advice and services. Similarly, Mr. McTague has been consulted as counsel or solicitor and has been properly remunerated in that capacity. It should also be noted that all of the executors or trustees other than the widow, Mr. Parker and Mr. McTague, have held senior editorial or executive appointments on The Evening Telegram at various periods, for which they have been paid salaries commensurate with their duties and positions. It would appear, however, that

none of the legal fees or salaries just referred to included any trustee allowance whatever.

At the outset I would wish to state that if the Court is at liberty to remunerate the various executors and trustees under the provisions of s. 60 (1) of The Trustee Act, R.S.O. 1937, c. 165, without regard to the limitations contained in clause 3 of the will, something far in excess of those amounts would undoubtedly be granted. The administration of this estate has been remarkably successful. Its net probate value was approximately \$1,750,000 and it comprised two main assets, the business and assets of The Evening Telegram and the other extensive assets. As a result of the efforts of the executors and trustees in conducting the business of The Evening Telegram, and by reason of their wise and careful administration, they have been able to pay out to the proper objects something in excess of \$13,750,000, and they now have available, to meet administration expenses and for final distribution, cash and negotiable securities having an aggregate present value of nearly \$1,000,000. The management of the estate has required the constant and careful attention of all the executors and trustees. Numerous difficult and complex problems have arisen during the course of their administration, the greatest of which perhaps were the protracted and intricate negotiations with various interests for the disposal of the business of The Evening Telegram and ultimately the sale of that asset by tender for an amount approximating \$3,750,000.

It is contended, however, that clause 3 of the will imposes an absolute limit upon the amount which the persons therein named may receive. With some reluctance I am driven to the conclusion that that contention is sound, if proper effect is given to s. 60 of The Trustee Act.

While I think that the claims for additional compensation are defeated by the Act, I wish to make it clear that in my opinion the claimants do not fail because of the presumption that if a legacy is given to an executor named in a will it is intended by the deceased as compensation for the work to be performed in carrying out the duties of the office. I believe that that presumption has been overcome by the contents of this particular will. A fair construction of the whole document demonstrates that the several bequests to the original executors were given independently of their having been named to that office. The be-

quests and annuities in favour of the widow and of Irving Earle Robertson and Douglas Sinclair Robertson, respectively a son and nephew of the deceased, are founded upon the relationship of those beneficiaries to the deceased rather than upon their being asked to act as executors. Similarly, the gifts to John Robinson Robinson and Alfred Taylor Chadwick are included with many others in favour of employees of The Evening Telegram, and it cannot be doubted that they are beneficiaries by reason of their association with the newspaper rather than because of being named as executors in the will. If any further support is required for my conclusion on this point, it can be found in the words "and not more" in clause 3, which make it abundantly clear that any bequests subsequently conferred by the document are not to be deemed to be compensation for the efforts of the persons named as executors and trustees.

I repeat, however, that so far as the original executors and trustees are concerned, the language of clause 3 of the will and that of subs. 5 of s. 60 of The Trustee Act prevent the sanction of any allowance of compensation in excess of those amounts which are mentioned in clause 3.

It must be remembered that prior to the introduction in Upper Canada of the predecessor of that section, it was a general principle that a personal representative was entitled to no allowance at law or in equity for personal trouble and loss of time in the execution of his duties unless there was an express contract or other stipulation for remuneration. Indeed that is the law of England today. The principle was first relaxed in our Province in 1858. In that year by 22 Vict., c. 93, s. 47, our Surrogate Courts were permitted to make allowances in favour of executors and administrators, and that power was subsequently extended to include allowances to guardians and trustees other than personal representatives.

Thus it is clear that unless an executor or trustee can bring himself within the scope of s. 60, or can show some agreement for remuneration, he cannot recover compensation for his labours. It is not contended here that there is any such agreement or other understanding to pay the original executors and trustees, and therefore they are precluded from receiving further grants because of the limitation contained in subs. 5 of 60 of the Act. In this case clause 3 clearly fixes the amount of the allowance to



the executors and trustees named in that clause; that being so, subs. 5 operates to remove entirely the application of the other provisions of s. 60. This conclusion seems to be fully supported by the decisions of our Courts in *Williams v. Roy et al.* (1885), 9 O.R. 534; *Re Holmes* (1916), 10 O.W.N. 354, and *Re McDonagh* (1920), 18 O.W.N. 154.

In *Williams v. Roy et al.* the testator inserted this clause in his will: "I hereby authorize and direct my said executors to retain for their own use and benefit the sum of two hundred dollars each, in lieu of all charges for their services in performing the duties imposed on them as executors of this my will." When that case came to be decided the Legislature had passed, in 1874, the equivalent of what is now contained in subs. 5 of s. 60 of our Trustee Act. In speaking of that enactment Boyd C. says:

"... the principle is laid down that the Court is not to fix the allowance where the testator has himself provided what it shall be. That is a most reasonable rule, and one of general application, one indeed to which the Court should give effect without requiring a parliamentary declaration as to its propriety. The testator stipulates what shall be paid to the executors, and they, knowing the terms accept probate and thereby accede to what is offered as their compensation. No such disastrous consequences will follow from this line of decision as were suggested during the argument. If the executors named do not like the terms they need not act; if they do not act there will be no difficulty in getting as administrator one or other of the beneficiaries under the will. That is one solution, if the executor does not act. Another is, that if any special reason exists for inducing the executor named to take out probate, and the terms of compensation in the will are inadequate, he may bargain with those interested for the statutory allowance, as a condition of acting. No possible objection could be made to such an arrangement, and it was a common device in former days when no payment to trustee or executor was allowed, to make a prior bargain with the beneficiaries. The Court was jealous in sanctioning such bargains and scrutinized them strictly, but the necessity for such supervision would not apply where only what the statute sanctioned was claimed. A possible case may arise where no administrator can be got to act, and where it is impracticable to deal with those entitled to the assets. I do not doubt in such a case

(in order to prevent destruction and loss), that the Court would have jurisdiction to permit the compensation give by the statute to be awarded to the executor on condition of his relinquishing what is given to him by the will, but such an application should be as a rule before probate, and very clear proof should be made as to the inadequacy of what is fixed by the will."

In *Re Holmes, supra*, the deceased appointed three executors and added: "They shall each have \$150." The late Mr. Justice Middleton, upon being asked whether that sum was in addition to the compensation the executors would otherwise have said: "Clearly this was intended to be their sole remuneration."

While the note on the *McDonagh* case, *supra*, is not as elaborate as one would wish, it is clear from what was said by Logie J. at p. 156 that he was adopting the reasoning and result stated by Chancellor Boyd. I see no reason why I should not do likewise.

Very strong and able argument is presented by those representing the original executors and trustees in favour of further allowances. It is contended that, having regard to the size of the estate and the responsibilities cast upon those being named as executors and trustees, clause 3 does not constitute an allowance of compensation at all, but on the contrary is an abortive attempt to avoid the fair and equitable consequences of subs. 1 of s. 60 of the Act. It is said that subs. 5 should never be invoked unless the allowance fixed by the instrument creating the trust is, in all the circumstances, a just and reasonable allowance. Putting it another way, it is said that subs. 5 applies only if the allowance specified by the testator exhibits the exercise of good faith on his part and is reasonable, having regard to the duties and responsibilities being assigned.

Reliance was placed upon several cases, the first of which was *Denison v. Denison* (1870), 17 Gr. 306, where the will contained the words "each of my trustees shall be paid the full sum of one hundred pounds out of my estate to see my will fully carried out". It was there held that the trustees were at liberty to claim a further sum under the statute which was then in force if the legacy of £100 did not represent adequate compensation. Actually one trustee was allowed \$1,500 as compensation and the other two were allowed \$1,500 between them. In granting those amounts Spragge C. upheld the opinion of the accountant that

they were fair and reasonable and in answer to the contention that the trustees were limited to the sum of £100 each he had this to say:

"Now that the principle of compensation is established by the Legislature, I do not think that the circumstance of a legacy to the executors should take the case out of the general rule. Where indeed the amount bequeathed is sufficient compensation there is no reason for allowing more. The allowance in such case is no exception to the statute as the question of what is fair and reasonable is considered."

I call attention to the fact, however, that the *Denison* judgment was rendered before the predecessor of subs. 5 of s. 60 had come into existence and the Chancellor was therefore not obliged to consider the effect of that legislation. Undoubtedly that is the reason why the value of the judgment is expressly doubted by Boyd C. in *Williams v. Roy et al.*, *supra*.

The second decision to which reference was made is *Kennedy v. Pingle* (1879), 27 Gr. 305, a decision which I must confess I have some difficulty in understanding. There the will contained the following clause: "I also desire that my said executors shall receive, out of the proceeds of the above sale, the sum of \$40 each as a legacy from me, and in remuneration for their trouble." On the passing of accounts the Master allowed to the executors \$440 by way of compensation and upon a motion for further directions, heard by Spragge C., objection was taken that the executors were not entitled to receive both their \$40 as a legacy and the \$440 by way of compensation. All that the learned Chancellor said on the point was this: "*Freeman v. Fairlie* [ (1817), 3 Mer. 24, 36 E.R. 10], supports this objection. They are, therefore, not to be allowed the legacies."

Although this judgment was delivered in 1879, no reference whatever is made to the passage of what is now subs. 5 of s. 60 of The Trustee Act which, as I have already mentioned, was first enacted in 1874 by 37 Vict., c. 9, s. 4. If a principle was intended to be confirmed or established by the learned Chancellor it does not seem to be applicable to this matter as the factual circumstances supporting his opinion are not those which confront me. In any event it would almost seem that the result there obtained conflicts with the well-established rule of law, already discussed, that a legacy in favour of an executor is presumed to be com-



pensation for the work involved, unless a contrary intention may be gathered from the will.

Another case cited was that of *Eastern Trust Co. v. Keith et al.* (1923), 56 N.S.R. 355, decided under quite distinct statutory provisions. Because of the wording of the will and the interpretation placed upon two sections of The Probate Act of Nova Scotia, the Court was able to differentiate between remuneration earned by the executors as such up to and including the final passing of their accounts, for which provision had been made in the will, and commissions to which they became entitled as trustees upon the sale of a parcel of real estate after the final passing of their accounts as executors. After providing for certain specific legacies and the payment of debts, the estate was vested in the "trustees", and the Court emphasized that the word had been used advisedly by the deceased in contradistinction to the word "executors". Accordingly, it was held that a bequest of \$1,200 "in lieu of all commissions that can be allowed or ordered by the Court of Probate for their care, pains and labour in winding up my estate" did not operate to curtail the amount of commissions earned upon a sale following the final passing of the executors' accounts.

Reference was also made to *Deedes v. Graham* (1873), 20 Gr. 258, which does not seem to afford any real assistance on this particular point, and to *Re Anderson*, 55 O.L.R. 527, [1924] 4 D.L.R. 441 (and on appeal in 56 O.L.R. 228, [1925] 1 D.L.R. 371), which is simply an illustration of the willingness of the Court to allow compensation under subs. 1 of s. 60 in respect of any services for which allowance has not already been arranged by the instrument of trust.

Clause 3 of the will is free of any ambiguity, and any reasonable interpretation of its language and the words of subs. 5 of s. 60 of the Act would seem to me to exclude, so far as the original trustees and executors are concerned, the operation of the first four subsections of that section. To give effect to the contention put forward on their behalf would destroy much of the force of subs. 5. If I comprehend their position it is that in all cases trustees are to receive fair and reasonable allowances for their trouble, and that if the document creating the trust fixes an allowance which according to ordinary standards should not be considered as fair and reasonable, the Court must disregard the written word and proceed under the provisions of subs. 1 of s.

60. As I say, the result of that contention would be to nullify subs. 5. I prefer to think that the subsection is to be given its full effect and that the judgments in *Williams v. Roy et al.*, *supra*, *Re Holmes*, *supra*, and *Re McDonagh*, *supra*, are to be followed.

Further confirmation for my view is to be found in *Heron v. Moffatt* (1878), 7 P.R. 438, where it was held that if the executors' compensation is fixed by the will, the Surrogate Court Judge cannot reduce the amount. Thus, even if the allowance fixed by the instrument is unreasonably high, the Court has no power to intervene. Surely the converse is also true.

If the contention put forward on behalf of the original executors and trustees were to prevail, what would be the true test to be applied? It is said that before subs. 5 can be invoked it must be shown that the testator acted reasonably and in good faith. Who can say that he has failed to do so, and beyond what level of allowances is the Court to have resort to subs. 5? Those are problems which I should not care to solve. In this particular case I have no reason to think that the testator acted in bad faith. It may very well be that during his lifetime the deceased imparted substantial advantages to all or some of those named as original executors and trustees. Nor should it be overlooked that each of them had a personal interest in promoting a careful and prudent administration of the estate, for each would benefit thereby. And it cannot be said that the allowances mentioned in clause 3 were in fact no allowances at all. The testator did differentiate between the five whom he named, and so demonstrated that he had given consideration to the amounts for which he was stipulating.

It was further argued that regardless of what might be allowed for the ordinary administration of the estate, some further relief should be given because of the trust for sale of The Evening Telegram business. That cannot be so, however, as the very document which made provision for the sale also fixed the amount of remuneration of those who were to carry out the entire provisions of the will, including that trust for sale.

Another argument was based upon the fact that in 1939 (*Re Robertson*, [1939] O.W.N. 569, [1939] 4 D.L.R. 511) an intestacy was declared with respect to income earned in the period from the 31st May 1939 to the date of the death of the widow, it being suggested that so far as the administration of that in-

come was concerned, it was not within the contemplation or control of the will and that accordingly the executors or trustees who acted during such period could turn to subs. 1 of s. 60 for further allowance. That argument cannot prevail since the executors and trustees acquired their office by reason of the will and were obliged to administer the estate either under the terms of the will or pursuant to law. It seems to me that even if all other clauses of the will had failed, the executors and trustees, having come into possession of their right to act because of clauses 3 and 4, would be bound by the limitations as to remuneration imposed by the provisions of those clauses. It would be rather odd if an executor could recover additional compensation with respect to assets dealt with upon an unexpected intestacy, even though the testator had set a high figure as compensation for the administration of all his assets. No such principle exists, so far as I am aware.

For the foregoing reasons, therefore, I am of the opinion that the original executors and trustees are restricted to the allowances mentioned in clause 3 of the will.

The successor trustees are in a more fortunate position. The amounts of their allowance are not fixed by the will and, therefore, subs. 1 of s. 60 applies. To decide that their allowances are not determined by the instrument in question is to give the only proper interpretation to clauses 3 and 4 of the will. The words "her and their" in clause 3 make it perfectly plain that the testator was intending to state the amounts of remuneration only so far as they affected those named in clause 3. Had he meant those restrictions to apply to successor trustees, he could easily have inserted words of wider scope in clause 3 as he did in clause 4. My interpretation is further supported by the change from the use of the word "and" between the words "executors" and "trustees" in clause 3 to the word "or" between those words where they appear in several places in clause 4. Confirmation for the thought that subs. 5 of s. 60 should not be made applicable to the successor trustees is to be found in *Freeborn et al. v. Vandusen* (1893), 15 P.R. 264, although it scarcely seems that one would need authority for that proposition. Surely no argument is required to sustain the view that successor trustees are not bound to the amounts expressly fixed in the will as remuneration for the original executors. For one thing, delicate



problems of division would undoubtedly arise. I have no hesitation therefore in saying that the successor trustees are not affected by subs. 5 of s. 60 and that they are entitled to receive compensation without regard to the amounts mentioned in clause 3 of the will.

My judgment as to successor trustees applies also to Judge Parker, although he has since retired from office. It was argued that by his conduct he waived any right to claim or receive compensation. Curiously enough there appear to be no English or Canadian authorities upon the subject matter of waiver of compensation by an executor, although it has been decided that a personal representative may conduct himself in such a way as to be deemed to have waived his right of retainer, which is a personal right of the executor recognized by our law to retain, as against creditors of equal degree, out of the assets of his testator a sufficient amount to meet a debt owing to himself: see 14 Halsbury, 2nd ed. 1934, p. 337. By analogy it would seem to me that an executor can lose his right to compensation in the same way.

There are many American cases touching upon the question and I was specifically referred to *Spencer et al. v. Spencer et al.* (1899), 56 N.Y.S. 460; *Cook et al. v. Stockwell et al.* (1912), 100 N.E. 131; *Wiener's Estate* (1895), 16 Pa. Co. Ct. R. 530; *Pile's Estate* (1901), 25 Pa. Co. Ct. R. 529. These decisions, together with those cited in 65 Corpus Juris, 1933, p. 913, para. 810, establish the following principles of law so far as the several States in which the cases were decided are concerned:

(1) An executor's or trustee's waiver of compensation or allowance is a fact to be shown by evidence, either of express declarations, or of acts and statements indicating an intent to forego the claim, or by a course of conduct from which such intent may be deduced.

(2) Waiver is considered to be established: (a) where the executor or trustee agrees to serve gratuitously and his appointment is made upon that basis; or (b) where the ultimate period for accounting is allowed to pass without any claim for compensation being asserted; or (c) where the whole income received is paid out continuously to the beneficiaries without deductions for commissions or without setting up a reserve with which to pay the same in the end, under circumstances suggesting a purpose to relinquish and not merely to postpone the claim, as where the

payments of the entire income have been so made over a long period of time; or (d) where the effect of postponement is to have the burden of the compensation imposed upon beneficiaries or upon a fund not liable therefor; or (e) where both income and capital are completely distributed to those entitled without any deductions or provision for payment of remuneration.

(3) Where payments without deductions have been made under conditions indicating an intention to postpone the claim, or at least showing an absence of intention to abandon the claim, there is no waiver and compensation may be allowed, provided funds which are properly chargeable with the compensation are still available.

(4) The mere fact that no claim is asserted at the time that any part of the estate is distributed is not conclusive against the executor or trustee, particularly if his failure to deduct or claim compensation has worked no prejudice against the *cestui que trust*.

It would seem proper that our Courts should adopt and apply those principles, but even so there is no reason to think that Judge Parker's claim to compensation has been extinguished; proof of waiver on his part by conduct or otherwise is completely lacking.

As I have already said, Judge Parker served as one of the trustees from the 7th February 1929 until he resigned on the 28th November 1934, on which latter date Charles Henry Jeremiah Snider was appointed by the widow to fill the vacancy thus created. The evidence also shows that the accounts of the estate were passed on 11th December 1935 and subsequently on 29th January 1940 and 18th June 1946. So far as the passing first above mentioned is concerned, it would appear that the accounts were passed on the 11th December 1935 for the period from 1st June 1924 to 31st May 1935, which period does not coincide with Judge Parker's tenure of office, and that he was not a party to the proceedings. No mention is made of him in any capacity in the appointment leading to the attendance before the County Court Judge or in the order which was subsequently issued. At that time the then executors and trustees of the estate filed an affidavit in which it was recited that Judge Parker had been nominated and "thereafter the said James Parker continued as executor and trustee of the will of the said John Ross Robertson, deceased, until discharged from the said trust of the said will

as hereinafter mentioned". The said affidavit continued by stating that "On the 24th day of November 1934 the said Judge Parker declared his desire of being discharged from the trust of the said will", and that on the 28th November 1934 the widow of the deceased appointed the said Charles Henry Jeremiah Snider. The evidence further indicates that at no time was an order of the Court made discharging Judge Parker from the trust.

With respect to the passing of accounts in 1940, Judge Parker was not a party in his own right, but was served with notice of the appointment as one of the surviving executors of the last will and testament of Irving Earle Robertson deceased, a beneficiary of the estate, and the order made on that occasion recites that the surviving executors of the last will and testament of Irving Earle Robertson deceased attended upon the said passing of accounts. When the accounts were passed in 1946 the late Judge Parker, though then alive, was not referred to in the petition, the appointment or the order in any capacity.

In that state of facts there is no support for the theory that Judge Parker actually intended to abandon his claim to be remunerated for his efforts as a trustee. Certainly he made no announcement to the effect that he was serving gratuitously, and it may well be that he was deferring his request for compensation until such time as the accumulated income was about to be distributed.

Nor do I think that his passive conduct was sufficient in the circumstances to warrant a decision that he forfeited his right to claim remuneration. Under the will of the late Mr. Robertson, the income from his estate was to provide for certain annuities to his widow, his children and The Hospital for Sick Children, with the remainder of the net annual income to be held and invested and accumulated for distribution as part of the general estate. Other evidence before the Court establishes that there was surplus income which was accumulated from the date of the death of the testator to the 31st May 1939, after which time the surplus income was paid to the next-of-kin of the deceased under the provisions of the order of Mr. Justice McTague dated the 16th November 1939: [1939] O.W.N. 569, [1939] 4 D.L.R. 511. Thus it will be seen that during the period in which Judge Parker served the income received by the trustees was disbursed only to the extent of providing funds for the annuities. The balance



was set aside for future distribution. Counsel for the executors and trustees have stated that the funds presently in their hands cannot be identified as having come from any particular source, capital or income, or from any particular period. Accordingly, it would seem that funds properly chargeable with the payment of compensation to Judge Parker are still available, and certainly the ultimate period for accounting has not yet passed.

The mere fact that Judge Parker was never formally discharged from the trust is not without significance. It was argued with vigour that once a trustee is discharged or parts with the assets under administration, he thereby irrevocably loses his right to remuneration. No authority was cited for that proposition and I am not prepared to accept it. Several instances come to my mind where it would have no application. For example, a trustee who is granted leave to retire because of illness might be obliged for practical reasons to transfer the assets to the newly appointed trustees before he is able to bring in his statement of accounts upon which his allowance as trustee is to be calculated. Surely it could not be successfully argued that in such a situation the right to compensation disappeared. I concede a different result if the executor completes distribution to those beneficially entitled. In any event, there is no evidence here that Judge Parker did anything more than retire; he was not discharged by the Court and there is no suggestion that he was called upon actually to transfer assets to the successor trustees.

For these reasons I think that Judge Parker's estate is entitled to ask for compensation for his services as a successor trustee.

That disposes of the first question submitted, and as I have already stated, I am not now being asked to decide any problems concerning the quantum of compensation. They will have to be resolved in other proceedings.

All parties to this motion are entitled to their costs, but, having regard to the position which they voiced at the hearing, it would seem only proper that The Hospital for Incurables, The Infants' Home and Infirmary, and The Grand Secretary and The Grand Treasurer of the Masons should divide one set of costs.

*Order accordingly.*

*Solicitors for the applicants: Fraser, Beatty, Tucker, McIntosh & Stewart, Toronto.*

*Solicitors for Alfred Newton Mitchell, Walter Lockhart Gordon and National Trust Company Limited, Trustees: Blake, Anglin, Osler & Cassels, Toronto.*

*Solicitors for The Hospital for Sick Children: Tilley, Carson, Morlock & McCrimmon, Toronto.*

*Solicitors for The Hospital for Incurables: Clark, Gray, Baird & Cawthorne, Toronto.*

*Solicitors for The Infants Home and Infirmary: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.*

*Solicitors for A. F. & A. M.: Kilmer, Rumball, Gordon, Beatty & Dean, Toronto.*

*Solicitors for the executors of Jessie Elizabeth Cameron: Bicknell, Cameron & Chisholm, Toronto.*

*Solicitors for the executrix of Irving Earle Robertson: Holmsted, Sutton, Hill & Kemp, Toronto.*

*Solicitors for the executors of James Parker: Crabtree & Rogers, Toronto.*

*Solicitors for the estate of John Robinson Robinson: Robinson & Haines, Toronto.*

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[SCHROEDER J.]

**B & M Readers' Service Limited v. Anglo Canadian Publishers Limited.**

*Contracts—Construction—Intention of Parties—Implied Terms—Reluctance of Court to Imply Term in Contract—Magazine Subscriptions—Whether Contract of Agency or Sale of Goods—Rights and Obligations of Parties.*

Although it is established law that if an agent is prevented from earning his remuneration by some wrongful act or default on the part of his principal he will be entitled to recover damages equal to the loss sustained by him, he must affirmatively establish a wrongful act or default to come within the rule. Where an agent is appointed for a fixed time it is an implied term of the contract that the principal will not prevent him from acting as representative during the agreed term. *Mutzenbecher et al. v. La Aseguradora Espanola*, [1906] 1 K.B. 254; *Warren and Co. v. Agdeshman* (1922), 38 T.L.R. 588, applied. But where there is no express stipulation as to time in the contract of agency, this rule can apply only if such a term is to be implied within the rules laid down as to implying terms in *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108. The term will not be implied unless it is necessary in order to give business efficacy to the intention of the parties as gathered from the words of the agreement, read in the light of the circumstances adduced in evidence. *Lazarus v. Cairn Line of Steamships Limited* (1912), 106 L.T. 378; *L. French and Company, Limited v. Leeston Shipping Company, Limited*, [1922] 1 A.C. 451; *Pollard v. Gibson* (1924), 55 O.L.R. 424, referred to.

*Pleadings—Amendment—Wide Discretionary Powers of Court—Amendment at Trial—Setting up Different Cause of Action—Rule 183.*

While the Court possesses very wide powers of amendment under Rule 183, these powers, which are discretionary, should not be exercised if the result would be to permit a plaintiff, after a trial has been partially completed, to set up a radically different cause of action, the defence to which would be quite different from that to be offered in the action as originally framed. Thus, where an action is brought for breach of a contract for the sale of goods, the plaintiff should not be permitted at trial to amend his statement of claim so as to set up an alternative claim based upon breach of an agency agreement.

AN ACTION for damages for breach of contract.

10th and 11th May 1949. The action was tried by SCHROEDER J. without a jury at Toronto.

*R. H. Sankey, K.C.*, for the plaintiff.

*J. D. Arnup*, for the defendant.

11th May 1949. SCHROEDER J. (orally):—This is an action brought by the plaintiff upon an oral contract entered into by the plaintiff's predecessor, a partnership, with the defendant company, Anglo Canadian Publishers Limited. The predecessor of the plaintiff was a firm composed of James Gilhooley and Kenneth B. Rickert, trading under the name and style of "B & M Readers' Service" ("B & M" representing "books and magazines"). The plaintiff company and its predecessor firm carried



on business as distributors of books and magazines which they sold to subscribers under an agreement, in this way: They would enter into an agreement with a subscriber whereby they would make available to him several magazines and books which would be delivered weekly or monthly, as the case might be, for a stipulated sum, in most cases \$15, which was to be paid over a period of 15 months at the rate of \$1 a month. While called a "distributor", the plaintiff may also be described as a "subscription agent".

In para. 2 of the statement of claim the following is pleaded: "On or about the 30th day of July, 1947, James Gilhooley and Kenneth B. Rickert, trading under the firm name and style of B & M Readers' Service, hereinafter called 'the said firm,' entered into an oral agreement with the defendant whereby the said firm agreed to solicit and to endeavour to procure subscriptions in Canada for a monthly magazine published by the defendant and known as New World Illustrated. It was further provided by the said agreement that the said firm would purchase from the defendant, at a price equivalent to 10 per cent. of the amount of the subscriptions obtained by the said firm, sufficient numbers of the said magazine to fill subscriptions or orders therefor obtained by the said firm, and that the defendant would send by mail to customers of the said firm monthly issues of the said magazine so purchased during the full terms of their respective subscriptions. At the time of the making of the said agreement it was disclosed by the said firm to the defendant that the said subscriptions were to be procured by the said firm under its 'paid during service' plan, that is to say, the said magazine was to be sold by the said firm to its customers in combination with other periodicals for a combined price to be paid by monthly instalments and the said plan was followed thereafter."

I have set out this paragraph of the statement of claim *in extenso* to indicate that while it is stated that the oral agreement bound the predecessor of the plaintiff company to solicit and endeavour to procure subscriptions in Canada for the magazine published by the defendant company, it is also pleaded that the arrangement entered into between the parties was a contract of sale and purchase of the magazine to be published over a period of one, two, three, or perhaps five, years. I mention this because, in my opinion, it makes a very substantial difference as

to the rights of the parties whether the contract is to be regarded as a contract for the sale of goods or as a commission agency agreement.

To support the oral contract pleaded in para. 2 of the statement of claim there is offered by the plaintiff the evidence of Mr. James Gilhooley as to a conversation which took place toward the end of July in the year 1947, between himself and his then partner, Mr. Rickert, and Mr. Simon G. Myrans, the secretary-treasurer of the defendant company. Mr. Gilhooley's version of this conversation is substantially as follows: "I told Myrans that we were forming a new company, and I asked him if he would sell New World to us, to be sold under a 'paid during service' plan, subscriptions to be collected on a monthly payment plan. He agreed, and said it would cost us 10 per cent. of the retail subscription price—\$1.50 for two years, \$2.00 for three years. That is standard among Canadian publishers. The Anglo Canadian company was to service our orders within 90 days of the receipt thereof, and thereafter until the entire period was serviced. Myrans knew that we would sell under 'paid during service' contracts, and would finance the purchase ourselves." Then he goes on to explain the nature of the engagement which this company makes with its subscribers.

Mr. Rickert was not called as a witness.

The plaintiff also called, as its own witness upon a question relating to damages, Mr. Simon G. Myrans, the secretary-treasurer of the defendant company, and he was then cross-examined by counsel for the defendant company. Mr. Myrans's evidence is substantially to the following effect: "In the month of July 1947 Mr. Rickert and Mr. Gilhooley and I had a conversation. I knew Mr. Gilhooley prior to that date as an employee of the Collier company, and I became acquainted with him in connection with the general publication business. Mr. Gilhooley approached me toward the end of July 1947, with Mr. Rickert. I knew he was starting in business as a subscription agency, and he asked me if he could solicit subscriptions for New World. Knowing him favourably, I agreed." He went on to say: "We have arrangements with other subscription agencies, and we discussed financial arrangements. I agreed to pay him 90 per cent. commission. I must have said 'we will pay a commission of 90 per cent.' because that is the way I always thought about it.

I agreed with them that they could act as an agency for the New World magazine. Then I said: 'I will pay you 90 per cent. on all subscriptions.' I do not think I told him that the cost to him would be 10 per cent. of the retail price." Then Mr. Myrans emphasized it in this way, saying: "I am certain that the only figure I mentioned was 90 per cent." He admits that it was clear to him that Mr. Gilhooley and Mr. Rickert were going to sell on a "paid during service" contract—a form of contract that is well known to the trade, under which the subscription agency does the collecting, and if the customer defaults the publisher always makes a rebate to the agent on a *pro rata* basis. "The subscription agent always ends up", according to Mr. Myrans, "by getting 90 per cent. of the amount collected from the subscriber."

The plaintiff paid the defendant 10 per cent. of the price of each magazine delivered to subscribers during the previous month, retaining 90 per cent. as its commission.

It would appear from the evidence that customers procured by the plaintiff company or its predecessor commenced to receive the magazine "New World Illustrated" in the month of October 1947, and received deliveries until the month of February 1948, when the defendant company discontinued publication of the magazine for the reason, as stated by Mr. Myrans, that they could not continue publication except at a loss, and to avoid greater losses the board of directors determined that publication of the magazine must be terminated. They entered into an agreement with the Maclean-Hunter company, which agreed to substitute its publications known as "Chatelaine" and "Maclean's Magazine" for the "New World Illustrated". They also agreed with Consolidated Press to have that company substitute its magazine, known as "The Canadian Home Journal". A further arrangement was made with the Home Publishing Company to substitute its publication known as "National Home Monthly". In each case these substitutes were to be furnished to the extent of subsisting contracts with subscribers.

The plaintiff company alleges that as a result of the cessation of publication of the magazine it sustained heavy losses, which are set out in some detail in the statement of claim. A great deal of evidence was submitted to show the losses that were sustained, not only as the result of loss of profits which the plaintiff company could have earned had the magazine been published during



the term of the subsistence of the agreements procured by the plaintiff company, but arising also through cancellations made by some 838 subscribers; also through the expenses and costs incurred as incidental to effecting adjustments with their subscribers by reason of the circumstance that publication of the magazine had come to an end.

Now, the substantial difference between Mr. Gilhooley's version of the oral agreement which was entered into and Mr. Myrans's version thereof is that according to Mr. Gilhooley the agreement was not an agreement to act as a subscription agent for the defendant company on a commission basis, but was a contract for the sale of goods, on the terms which he mentions in his evidence. It is true that in the statement of claim it is said that the plaintiff firm agreed to solicit and endeavour to procure subscriptions in Canada for the defendant's publication, but then the statement of claim goes on, as I have indicated, to plead that the plaintiff would purchase from the defendant company, and that the latter would sell to the plaintiff, at the price mentioned, the magazines required to fill these subscriptions or orders. It is thus pleaded as a contract of sale, and the evidence of Mr. Gilhooley would lead to the conclusion that that was the true nature of the contract into which the parties entered.

The plaintiff also offers the testimony of Mr. Myrans, as I have said earlier, and his evidence is directly to the contrary. On the question as to the nature of the contract entered into, Mr. Myrans is very emphatic in stating that the only agreement that was made was an agreement to permit the plaintiff company, or its predecessor firm, to solicit subscriptions for the "New World", they to do the collecting, and to receive as remuneration for their services as agents a commission of 90 per cent. of the retail price of the magazine.

The burden of proof rests upon the plaintiff, and the plaintiff must establish, by a fair preponderance of credible testimony, that the contract is as pleaded in the statement of claim, rather than as alleged by the defendant in its statement of defence. If I had to choose between the evidence of the plaintiff's own witnesses, Mr. Gilhooley and Mr. Myrans, I should express a pronounced preference, on this point, in favour of the evidence of Mr. Myrans. Accepting his evidence, as I do, I have come to

the conclusion that he sets out the true nature of the bargain or agreement into which the parties entered, namely, that it was an agreement on the part of the defendant company to employ the plaintiff company's predecessor as its agent for the purpose of procuring subscriptions on the basis of a commission to be paid at the rate of 90 per cent. of the retail price of the magazine. It was essentially a contract of agency.

As I have already stated, the plaintiff company did not frame its action as one for damages for breach of an agency agreement. When it became apparent that that was the inference that would be drawn from the evidence of the plaintiff's own witness Mr. Myrans, counsel for the plaintiff asked if he might be permitted to amend the statement of claim so as to enable him to claim alternatively against the defendant on that basis. This course was objected to by counsel for the defendant, and I think rightly so, because while under Rule 183 of the Rules of Practice and Procedure the Court possesses very wide powers of amendment, I think it is clear upon authority that those powers, which are discretionary, should not be exercised in favour of the person seeking the amendment if the result would be to permit the setting up of a radically different cause of action. Would the plaintiff be setting up a radically different cause of action if the amendment sought were permitted? I think it would, to mention only this one reason, that the defence to an action based upon breach of an agency agreement would be quite different from that which would be offered in an action for breach of a contract for the sale of goods. For example: the defendant, if asked to meet a cause of action based upon breach of an agency agreement, would no doubt wish to call evidence designed to show that the discontinuance of publication of the magazine was for a solid and substantial business reason; that in discontinuing the publication of the magazine the defendant company acted in good faith, not from any improper motive, and certainly not wilfully or deliberately for the purpose of depriving the plaintiff of commissions that it might have earned. The defendant has called no evidence on that point, and indeed at this stage of the trial, when the amendment was asked for, could not be expected to call evidence upon it. Feeling, as I do, that what the plaintiff seeks to set up by the amendment proposed is a radically different cause of action from that which the defendant

was prepared to meet, I find myself unable to accede to the plaintiff's request, and I must decline to grant the amendment sought.

Having regard to my finding that the contract was not one of sale and purchase, the plaintiff obviously fails upon its case as pleaded, and, the Court having refused to allow the amendment sought, it perhaps becomes unnecessary to deal with the situation that would exist had the action been pleaded as one based upon breach of an agency agreement. However, the parties having dealt with the point in their arguments, it may not be amiss for me to discuss it.

I may say that the situation which exists between the defendant company and the subscribers who became contractors with it through the agency of the plaintiff company is vastly different from the situation that exists between the defendant and the plaintiff, regarded in the light of its position as agent of the defendant company.

The principle enunciated in the case of *Ogdens, Limited v. Nelson*; *Ogdens, Limited v. Telford*, [1905] A.C. 109, would no doubt apply to the dealings between these parties if the contract were one for the sale and purchase of magazines. It would no doubt apply to an action, if such an action might conceivably be brought, by a subscriber against the defendant company. But I do not think that this principle has any application here, if I am right in my conclusion that the contract entered into was an agency commission agreement, as outlined by Mr. Myrans.

In dealing with the alternative claim that he would make if driven to the point of conceding that the agreement is as the defendant urges it to be, counsel for the plaintiff refers to a passage in 1 Halsbury, 2nd ed. 1931, p. 261, para. 435, from which I quote:

"If an agent is prevented from earning his remuneration by some wrongful act or default on the part of the principal, he is entitled to recover from the latter as damages the actual loss sustained by him."

Now, is there anything wrongful in the conduct of the defendant in discontinuing the publication of the magazine "New World Illustrated"? If there had been a term of the contract between the defendant and its agent, the plaintiff company, binding the defendant not to cease publication of its magazine



for a stated period, then there would be something wrongful in its conduct, in the legal sense. Certainly there is no express term of the contract to that effect. Mr. Gilhooley frankly admits that the question was never discussed between him and Mr. Myrans. Then the question arises whether that term ought to be implied. Certainly I would feel that it ought to be implied if the contract were one for sale and purchase, but I do not think that the circumstances are such as to compel its implication if their relationship is founded upon an agreement of agency.

Contracts of agency, and the right to terminate such contracts, were considered and discussed in *Mutzenbecher et al v. La Aseguradora Espanola*, [1906] 1 K.B. 254, and *Warren and Co. v. Agdeshman* (1922), 38 T.L.R. 588. These cases appear to establish that where by the terms of such a contract the agent is appointed for a fixed time, it is implied that the principal will not prevent the agent from acting as representative during the agreed term. There being no express stipulation in this contract as to the term of the agency, the question arises: Must such a term necessarily be implied in order to give business efficacy to the intention of the parties as gathered from the words of the agreement, read in the light of the circumstances adduced in evidence?

In 12 E. & E. Digest, 1923, at pp. 607-616, are collected the English cases dealing with implied terms and the principles and rules which should guide the Court in interpreting a contract, where it is asked to imply a term. These cases seem to establish that the term cannot be implied unless it is necessary in order to give effect to the intention of the parties as gathered from the agreement, read in the light of the facts in evidence: *vide: Aspdin v. Austin* (1844), 5 Q.B. 671, 114 E.R. 1402; *Krell v. Henry*, [1903] 2 K.B. 740; *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; *In re Nott and The Corporation of Cardiff*, [1918] 2 K.B. 146, reversed *sub nom. Brodie v. Corporation of Cardiff*, [1919] A.C. 337; *L. French and Company, Limited v. Leeston Shipping Company, Limited*, [1922] 1 A.C. 451.

According to Mr. Gilhooley's evidence, the defendant was never shown the form of contract which the plaintiff had with its customers until after the cause of action arose, when it asked to be shown a sample form of the contract. He stated: "I doubt if Anglo Canadian knew of our contract or its nature.

We told them it was a 'paid during service' contract." The defendant was unquestionably aware of the fact that subscriptions had been obtained for one, two, three or five-year periods.

Dealing with the question of terms to be implied in certain classes of agreement, in *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108, [1941] 1 All E.R. 33, Viscount Simon L.C. said at p. 120: " . . . in contracts made with commission agents there is no justification for introducing an implied term unless it is necessary to do so for the purpose of giving to the contract the business effect which both parties intended it should have."

At p. 125 Lord Russell of Killowen said: "Implied terms, as we all know, can only be justified under the compulsion of some necessity."

At p. 137 Lord Wright put the matter in this way: "But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that 'it goes without saying,' some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties."

In the 1948 supplement to Halsbury, reference is made to para. 435, at p. 261 of vol. 1, referred to above. In referring to the first case cited in footnote (u), *Prickett v. Badger* (1856), 1 C.B.N.S. 296, 140 E.R. 123, the writer says: "The first case (if still good law) must be regarded as depending on its special facts. In the text 'wrongful act or default' needs emphasis; the agent must prove that the principal's act is wrongful, such wrong being in general a breach of the contract." The author cites the *Luxor* case, *supra*.

Viewing the contract between the parties as a commission agency agreement, I cannot find that there is such compulsion or necessity existing in the case under consideration as would compel the Court to imply a term that the publication of the magazine was not to be discontinued before a certain date, or during any particular period.

There is a line of authorities indicating how reluctant the Courts always are to imply such a term. Very strong circumstances must exist before the Court will imply a term such as the one suggested here, and such as must be implied before there can be said to be a breach of the contract between the agent and the principal. I need mention only the case of *L. French and Company, Limited v. Leeston Shipping Company, Limited, supra*, particularly what was said by Lord Buckmaster at p. 454 and Lord Dunedin at p. 455. Reference may also be made to *Lazarus v. Cairn Line of Steamships Limited* (1912), 106 L.T. 378. The case last mentioned was decided by Scrutton J., later L.J., who was regarded as an outstanding authority on commercial law, and the decision is one which is very apt in its application to the matters under consideration in the case at bar. The principles I have mentioned were applied in *Pollard v. Gibson*, 55 O.L.R. 424, [1924] 4 D.L.R. 354.

I stated earlier that I was refusing to grant the plaintiff's request for an amendment in order that it might base its claim against the defendant upon a breach by the defendant of an implied obligation, under an agency agreement, to conduct its business in such a manner as to permit the plaintiff company to continue to earn its commissions. In any event, I do not feel that even if the plaintiff were permitted to amend and claim against the defendant on that basis it could succeed, because it has certainly not shown any wrongful act or default on the part of the defendant in the sense in which it must be shown in order to entitle the plaintiff to succeed.

For the reasons stated I must dismiss the plaintiff's action. Had I arrived at a conclusion favourable to the plaintiff, I do not think that I would have undertaken to assess the damages, but I would have directed a reference for that purpose. I gather that counsel are quite in agreement with my view that that would have been the proper course to follow. Having come to a conclusion unfavourable to the plaintiff on the issue as pleaded, I do not now undertake to assess the damages. If it should be held by another forum that my judgment cannot stand, then that course will still be open.



There will be judgment for the defendant dismissing this action, with costs to be taxed.

*Action dismissed with costs.*

*Solicitors for the plaintiff: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.*

*Solicitors for the defendant: Mason, Foulds, Davidson & Arnup, Toronto.*

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[SCHROEDER J.]

**Re Carter and the City of Sudbury et al.**

*Franchises — Powers of Municipality to Grant — Special Act Incorporating Street Railway Company — Powers of Company — Franchise to Operate Motor Buses — The Municipal Franchises Act, R.S.O. 1937, c. 277, s. 3(1), as re-enacted by 1947, c. 70, s. 1.*

*Street Railways — Powers of Company — Operation of Buses — Terms of Franchise and Act of Incorporation — The Railway Act, R.S.O. 1937, c. 259, s. 1 (u).*

*Statutes — Interpretation — Agreement Made Schedule to, and Confirmed by, Special Statute — Whether Agreement to be Construed as Part of Statute — Effect of Interpretation Section in General Act.*

A company was incorporated by special Act with power to construct and operate "a railway to be operated by steam or electricity" within a defined area. By an agreement with the City of S. (assented to by the municipal electors) the company was granted a franchise to construct and operate "a street railway" within the city. This agreement was ratified and confirmed by a special Act of the Legislature, to which it was made a schedule. In 1949 the City passed two by-laws purporting to authorize the company to operate motor buses. These by-laws were not ratified by the electors, and they did not set out any term for which the powers were conferred.

*Held*, the by-laws were invalid for non-compliance with s. 3 (1) of The Municipal Franchises Act, as re-enacted in 1947. The company being a creature of statute, its powers were limited to such as were conferred by the statute. *London County Council v. The Attorney-General et al.*, [1902] A.C. 165, applied. The agreement between the company and the City should be read and construed as a part of the statute confirming it, and as itself a statutory enactment, since the statute did more than merely ratify and confirm it. *The Ottawa Electric Railway Company v. The City of Ottawa*, [1945] S.C.R. 105 at 122; *Winnipeg v. Winnipeg Electric Railway Company* (1921), 31 Man. R. 131; *City of Toronto v. Toronto R.W. Co.* (1918), 44 O.L.R. 308 at 316, affirmed [1920] A.C. 455, applied. The statute, being one that conferred exceptional privileges trenching on general rights, was subject to the principle of strict construction, and so construed it authorized the construction and operation of a street railway and the operation of cars which would run on rails constructed in the manner provided by the agreement. *The Grand Trunk Railway Company of Canada v. James* (1901), 31 S.C.R. 420, applied. It could not be said that the company had power under its Act of incorporation, or was authorized by the agreement, to operate buses, and the definition of "street railway" in s. 1(u) of the Ontario Railway Act (made applicable by the special Act of incorporation) could not confer on the company any power not specifically conferred on it by its Act of incorporation. *Reg v. Pearce* (1880), 5 Q.B.D. 386 at 389, applied. The 1949 by-laws, accordingly, did not merely authorize an extension of the railway service, for which authority was provided by the earlier by-law (assented to by the electors), but constituted the grant of a new right, and could accordingly be valid only if they complied with The Municipal Franchises Act.

A MOTION to quash two by-laws of the City of Sudbury.

5th May 1949. The motion was heard by SCHROEDER J. in Weekly Court at Toronto.

G. W. Mason, K.C., and S. P. Parker, for the applicant.

H. F. Parkinson, K.C., and J. M. Cooper, K.C., for the City of Sudbury, respondent.

*J. W. Pickup, K.C.*, for the Sudbury-Copper Cliff Suburban Electric Railway Company, respondent.

18th May 1949. SCHROEDER J.:—The applicant, a resident ratepayer of the city of Sudbury, moves in these proceedings to quash two by-laws of the City of Sudbury, being By-law no. 3017, passed on the 25th January 1949, and By-law no. 3032, passed on the 28th February 1949. By-law no. 3017 is in the following terms:

“1. The City of Sudbury hereby grants to the Sudbury-Copper Cliff Suburban Electric Railway Company the right and privilege of operating its buses over the route defined in the schedule attached hereto, such privilege to continue until such time as this by-law is revoked.”

By-law no. 3032 is in the following terms:

“1. The Sudbury Copper-Cliff Suburban Electric Railway Company (hereinafter referred to as the Company) is hereby authorized to operate buses for the transportation of passengers so as to provide a bus service for the area known as Gilman and Simcoe Streets in the City of Sudbury over the route designated on the schedule hereto attached and marked with the letter ‘A’.

“2. The Sudbury Copper-Cliff Suburban Electric Railway Company (hereinafter referred to as the Company) is further hereby authorized to operate buses for the transportation of passengers so as to provide a bus service for the area known as the David, Marion and McNaughton Street in the City of Sudbury over the route designated on the schedule hereto attached and marked with the letter ‘B’.

“3. Such authorization is granted to the said company on the condition that the said service is commenced within thirty days immediately after the passing of this by-law.”

The motion is based on three grounds:

(1) that the by-laws were passed without the assent of the municipal electors;

(2) that the by-laws do not limit the period for which the rights purported to be granted shall subsist;

(3) that the operation of buses is beyond the ambit of the powers of The Sudbury-Copper Cliff Suburban Electric Railway Company.



On the hearing of the motion The Sudbury-Copper Cliff Suburban Electric Railway Company, (hereinafter called "the Railway Company"), being directly affected, asked to be added as a party and I acceded to that request and heard the submissions made by it through counsel.

Subs. 1 of s. 3 of The Municipal Franchises Act, R.S.O. 1937, c. 277, as re-enacted by 1947, c. 70, s. 1, reads as follows:

"A municipal corporation shall not grant to any person nor shall any person acquire the right to use or occupy any of the highways of the municipality except as provided in *The Municipal Act*, or to construct or operate any part of a transportation system or public utility in the municipality, or to supply to the corporation or to the inhabitants of the municipality or any of them, gas, steam or electric light, heat or power, unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted or acquired has been assented to by the municipal electors."

It is not disputed that the by-laws attacked had not been submitted to the electors of the Corporation of the City of Sudbury (hereinafter referred to as "the Corporation") for their assent and the by-laws on their face do not appear to set forth the period—or any defined period—for which the rights conferred are to be enjoyed, so that on first impression both by-laws would seem to be bad for want of compliance in both respects with the provisions of the statute quoted.

It is, however, contended by the Railway Company and on behalf of the Corporation that the effect of both by-laws involved on the part of the city council nothing more than carrying into effect the duties and obligations imposed upon council by the provisions of a pre-existing agreement entered into between the Corporation and the Company, which was validated by provincial statute. It becomes necessary, therefore, to examine this legislation.

The Railway Company was incorporated by an Act of the Province of Ontario being 1912, c. 149. Section 2 of that private Act confers upon the company the following powers:

"The Company is authorized and empowered to survey, lay out, construct, complete, equip and maintain a railway to be operated by steam or electricity, or partly by one and partly by the other, from a point at, in or near the Town of Sudbury,

thence westerly to a point at, in or near the Town of Copper Cliff; also from a point at, in or near the said Town of Sudbury, thence easterly to a point at, in or near the Village of Coniston; also from a point at, in or near the said Town of Sudbury to the Creighton Mine; and also from a point at, in or near the said Town of Sudbury to the Blezard Mine, with power to construct branches or extensions at different points along the route, not exceeding ten miles in length, and to connect with other railroads now operating or under construction within the said territory."

Attention has been directed to The Railway Act, R.S.O. 1937, c. 259, and to the fact that by s. 9 of the Act of incorporation the provisions of The Ontario Railway Act, 1906, apply to the company and to the railway constructed or to be constructed by it and that by virtue of s. 16(b) of The Interpretation Act, R.S.O. 1937, c. 1, the provisions of the present Railway Act apply thereto. Section 1 (*u*) of The Railway Act provides that in that Act and in any special Act, in so far as The Railway Act applies thereto:

"'Street railway' shall mean a railway constructed or operated along and upon a highway under an agreement with or by-law of a city or town, although it may at some point or points deviate from the highway to a right of way owned by the company, under the powers conferred by section 243, and shall include all portions of the railway within the city or town and for a distance of not more than one and one-half miles beyond the limits thereof, although such one and one-half miles may be constructed under a by-law of or agreement with a municipal corporation other than that of such city or town, and shall also include any part of an electric railway which lies within the limits of a city or town and is constructed or operated along and upon a highway *and shall include busses and other vehicular means of transportation operated as part of or in connection with a street railway.*" (The italics are mine.)

The effect of the two sections lastly mentioned can be no greater than to subject the Railway Company, and any buses which it may operate as part of its business, to the provisions of the general Railway Act of the Province. They can hardly be claimed to have the effect of conferring upon the company any powers not specifically conferred upon it by the Act of in-

corporation or of adding to such powers in any respect so as to support the Railway Company's claim to the right to provide transportation by means of buses or by any other means not authorized by the terms of the incorporating statute.

"... an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain": per Lush J. in *Reg. v. Pearce et al.* (1880), 5 Q.B.D. 386 at 389.

"Another important rule with regard to the effect of an interpretation clause is, that an interpretation clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be under *all* circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended. If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration": Craies on Statute Law, 4th ed. 1936, p. 195, citing *Reg. v. The Justices of Cambridgeshire*; *Reg. v. The Justices of Shropshire*; *Reg. v. The Justices of Gloucestershire* (1838), 7 Ad. & E. 480 at 491, 112 E.R. 551.

It is to be noted that interpretation clauses are not to be used for the purpose of enacting under the guise of definition, and have often fallen under severe judicial criticism by reason of failure to observe that rule.

In *London County Council v. The Attorney-General et al.* [1902] A.C. 165, it was held that where a corporation is the creature of statute its powers are confined to such as are, expressly or by necessary implication, conferred by the statute, so that the London County Council, constituted by The Local Government Act, 1888, and having thereunder, and in virtue of other statutes, the power of acquiring and working tramways, was not entitled to run a service of omnibuses, such service not being a necessary incident of the business of a tramway company.

On 25th August 1913 the council of the City of Sudbury enacted By-law no. 343 authorizing the City to enter into an agreement with the Railway Company. This by-law received the



assent of the municipal electors in due course and an agreement was entered into. Both the by-law and the agreement were validated and confirmed by statute in the year 1914, being c. 125 of that year. It is important to consider the provisions of s. 2 of the latter statute for the purpose of determining whether or not it did more than merely validate and confirm the agreement between the Corporation and the Railway Company. This section reads as follows:

“By-law Number 343 of the Municipal Corporation of the Town of Sudbury set forth in Schedule 1 to this Act is ratified and confirmed and declared legal and valid notwithstanding any want of jurisdiction on the part of the said Municipality to pass the said by-law and notwithstanding any defect in substance or in form of the said By-law or in the manner of passing the same; and the said Corporation of the Town of Sudbury is authorized and empowered to do all necessary acts for the full and proper carrying out of the said By-law; and the agreement set forth as Schedule ‘A’ to the said by-law when executed by the said Corporation of the Town of Sudbury and the said railway company, the parties thereto, *shall be binding upon the said Corporation of the Town of Sudbury and the ratepayers thereof and likewise upon the said The Sudbury-Copper Cliff Suburban Electric Railway Company.*” (The italics are mine.)

By s. 1 of the said Act the time for commencement and completion of the railway was extended.

It will be observed that something more than mere ratification and confirmation of the agreement is accomplished and the agreement should, therefore, in fact be construed as a statutory enactment: see *The Ottawa Electric Railway Company v. The City of Ottawa*, [1945] S.C.R. 105 at 122, 57 C.R.T.C. 273.

It is not sufficient for the purpose of making a schedule or agreement a part of an Act that words in the Act merely confirm and validate the schedule or agreement. There must be words in the Act from which there can be inferred the intention of the Legislature to make the schedule or agreement part of the Act: *Winnipeg v. Winnipeg Electric Railway Company*, 31 Man. R. 131, [1921] 2 W.W.R. 282, 59 D.L.R. 251.

In *City of Toronto v. Toronto R.W. Co.* (1918), 44 O.L.R. 308 at 316, 46 D.L.R. 435, affirmed [1920] A.C. 455, 17 O.W.N. 503, 51 D.L.R. 48, Riddell J. stated: “The contract is, by sec. 1

of the Act (1892) 55 Vict. ch. 99, sec. 1 (Ont.), declared to be 'valid and legal and to be binding upon the . . . parties:' but it is not made a part of the Act, so that it becomes itself statutory, as was the case with the agreement considered in this Court recently in *Re City of Toronto and Toronto and York Radial R.W. Co. and County of York* (1918), 42 O.L.R. 545 [43 D.L.R. 49, 23 C.R.C. 218]. While legal and binding, it is legal and binding as a contract upon the parties, it is no different from any other contract: *City of Kingston v. Kingston Electric R.W. Co.* (1898), 25 A.R. 462, at pp. 468, 469, and cases cited."

In my opinion s. 2 of the 1914 statute above mentioned does a great deal more than did the statute referred to by Mr. Justice Riddell in the case just mentioned.

This statute is one which confers exceptional privileges on the Railway Company and it has been held that Acts which establish monopolies or confer exceptional exemptions and privileges correlatively trenching on general rights are subject to the principle of strict construction: see Maxwell on The Interpretation of Statutes, 9th ed. 1946, p. 298; see also Maxwell at p. 289 where the learned author states:

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights."

At p. 305 of the same work the learned author, dealing with the construction of private Acts, states that enactments of a local or personal character which confer any exceptional exemption from a common burden or invest private persons or bodies for their own benefit and profit with privileges and powers interfering with the property or rights of others, are construed against those persons or bodies more strictly, perhaps, than any other kind of enactment; and later:

"The Courts take notice that the statutory powers are obtained on the petitions framed by their promoters and, in construing them, regard them, as they are in effect, as contracts between those persons, or those whom they represent, and the Legislature on behalf of the public and for the public good. Their language is therefore treated as the language of their promoters, who asked the Legislature for them and, when doubt arises

as to its construction, the maxim (ordinarily inapplicable to the interpretation of statutes) that *verba cartarum fortius accipiuntur contra proferentem*, or that words are to be understood most strongly against him who uses them, is justly applied. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment grants and against those who claim to exercise them. Indeed, if words in a local or personal Act seem to express an intention to enact something unconnected with the purposes of the promoters which the committee, if they had done their duty, would not have allowed to be introduced, almost any construction, it has been said, would seem justifiable to prevent them from having that effect."

Even if the view be taken that the agreement annexed as a schedule to the 1914 Act is not to be regarded as having become part of the statute itself, it is still subject to a strict construction. Maxwell in the same edition, at pp. 306-7, writes:

"Even if such statutes were not regarded in the light of contracts, they would seem to be subject to strict construction on the same ground as grants from the Crown, to which they are analogous, are subject to it. As the latter are construed strictly against the grantee on the ground that prerogatives, rights, and emoluments are conferred on the Crown for great purposes and for the public use and are, therefore, not to be understood as diminished by any grant beyond what it takes away by necessary and unavoidable construction, so the Legislature, in granting away, in effect, the ordinary rights of the subject, should be understood as granting no more than actually passes by necessary and unavoidable construction."

It should be mentioned in passing that by s. 454 of The Municipal Act, R.S.O. 1937, c. 266, the soil and freehold of highways is vested in municipalities having jurisdiction over them but municipalities are not in the strict sense trustees of the rights of the general public to use those highways. I had occasion to deal with this point in *Williams and Wilson Limited v. The City of Toronto and The Attorney-General for Ontario*, [1946] O.R. 309, [1946] 4 D.L.R. 278, where it was held that the Attorney-General is the representative of the Crown in its capacity as *parens patriae* and is charged with the protection of the rights of the general public with respect to property which has become



devoted to highway purposes. Certainly when any person or group of persons or any private body is given the right to operate a transportation system over municipal highways, the rights of the general public with respect to the user and enjoyment of such highways is affected and the reason for the application of the principle of strict construction with reference to the particular rights conferred upon such persons or bodies would undeniably be well founded.

The following paragraphs of the agreement attached to the 1914 statute as schedule "A" were put forward by counsel as the portions of the agreement most relevant to the matters under consideration in the case at bar, and they are reproduced hereunder:

"5. The said Company, its successors and assigns, shall, subject to the conditions, restrictions, obligations, and provisions hereinafter contained, have in so far as the Corporation has power to grant the same, the authority, right and privilege to lay out, construct, complete, maintain and operate, by electricity and with the consent of the Corporation to be expressed by by-law any other power but steam, subject to the consent and approval of the engineer to be first had and obtained as a condition precedent to the construction of each and every part of the said railway, a street railway consisting of a single or double track, with necessary side tracks, switches, crossovers and turnouts, for the passage of cars upon and along the following streets and highways of the Town of Sudbury, that is to say: Regent, Lorne, Elm, Durham, Monk, College, Kathleen, Tedman, Morin Avenue, Notre Dame Avenue, Lisgar, Larch, Cedar, Station, Nelson, John, Elizabeth, McNaughton and Annie Street, and also to erect, construct and maintain upon the said streets and highways all poles, cables, wires and overhead constructions necessary to operate the said railway by trolley system or by any other system of electricity as the motive power, or by any motive power other than steam, for the term of twenty years from the date of the final passing of the by-law of the Corporation authorizing the entering into of this agreement, it being expressly provided and agreed that the town engineer in giving his approval as hereinbefore provided for, shall have the right to prescribe the situation, location and manner of construction of the said railway, poles, cables, wires and overhead constructions."

"6. Provided the Company first obtains the consent of the Corporation to be expressed by by-law passed by the Council of the said Corporation, it may, subject to the consent and approval of the engineer as hereinbefore provided for and to all other the terms, provisions, and conditions of this agreement, substitute other streets and highways within the municipality, or parts thereof, for the streets and highways named in paragraph five hereof, provided, however, that the provisions of this paragraph shall not be construed so as to prevent the Corporation from granting rights to any other railway or railways upon any streets or highways not hereinbefore expressly mentioned."

"9. The said Company shall also be entitled with the consent and approval of the Corporation expressed by by-law, subject to the terms, provisions and conditions of this agreement, to extend its street railway service along any other of the streets or highways of the Town of Sudbury, although the same are not specially named in this agreement."

"10. It is further provided and agreed that in the event of the Corporation determining that there should be a street railway service on any other street or highway in the Town of Sudbury other than those mentioned in paragraph five hereof, and in the event of their passing a by-law for such purpose, then the said Company shall thereupon proceed to construct a street railway on such other street or streets, highway or highways, or portions thereof as may be set out in the said by-law, and shall commence such construction within three months after notice shall be given by the Corporation to the Company setting out the provisions of such by-law, provided, however, that if within thirty days from the receipt by the said Company of such notice the Company shall give notice that it will not accept such by-law, and will not proceed to construct such railway upon the streets and highways, or parts thereof designated in said by-law, or if after having received the said notice above provided to be given by the Corporation the said Company shall not proceed with the necessary work of constructing and completing the same within the time limited by such notice as given by the Corporation, the Corporation may itself construct or grant authority to construct a railway upon any such streets, highways, or parts thereof to any other person or persons, firm or corporation, and in such case said company, person or persons, firm or the corporation

itself shall be entitled to construct such railway in accordance with any such agreement as may be entered into between the Corporation and the said person or persons, firm or corporation, and shall be entitled to cross the street railway line of the Company, the party of the second part hereto, with their railway at such point or points as may be necessary, or may be designated by the Council of the Corporation, and further if required by the Corporation by by-law the said Company shall accept transfers from the line or lines of any such company, person or persons, firm or the Corporation itself, upon such terms as to the place of transfer, amount of payment to be made therefor, and otherwise as the said Corporation by such by-law shall determine and direct, provided, however, that in case the Company shall be dissatisfied with the determination of the Corporation, the Company may appeal to the Ontario Railway and Municipal Board, whose decision shall be final."

The franchise was granted to the Railway Company for a period of 20 years and was to be continued for successive periods of 5 years thereafter in the absence of any effort on the part of the Corporation to take the Railway Company's assets over as provided by clause 41 of the agreement. The agreement is still in full force and effect.

Now what was substantially authorized by the agreement and by-law of 1913 and by the terms of the statute of which they became a part was the construction and operation of a street railway and the operation of cars, whether propelled electrically or by motive power other than steam, which would run on rails constructed in the manner provided by the agreement. Clause 9 of the agreement empowering the Railway Company, with the consent of the Corporation, to "extend its railway service" along other streets not named in the agreement, must be read along with and subject to the provisions of clause 5.

In *The Grand Trunk Railway Company v. James* (1901), 31 S.C.R. 420, 1 C.R.C. 422, it was held that "railway" ordinarily means a way on which a train passes by means of rails. It must receive that meaning unless there is some all-powerful necessity compelling a departure from it and justifying the addition of other entities. The Court, by a majority, held that "railway" does



not extend to "railway property" on the interpretation of The Railway Act, 1888, c. 29, as amended by 1890, c. 28.

Counsel opposing this motion urged very strongly that the words "street railway" and "railway service" must be given a liberal construction even if the agreement is to be regarded in the light of a statutory enactment, and should be so construed as to include the operation of motor buses on the streets mentioned in the schedules to the by-laws under consideration. This argument is advanced having regard to the definition of "street railway" contained in The Railway Act of Ontario quoted above. For the reasons hereinbefore mentioned, I entertain the opinion that these words must be strictly construed and I find myself unable to agree with the contention made on behalf of the respondents.

Reliance is placed on the decision of the Judicial Committee of the Privy Council in *British Columbia Electric Railway Company, Limited v. Stewart et al.*, [1913] A.C. 816, 14 D.L.R. 8, C.R. [1913] A.C. 337, 5 W.W.R. 25, 25 W.L.R. 227. It may be stated at once that if the extension of the transportation service purporting to be authorized by the by-laws which are the subject of challenge in the present proceedings, were directed to an extension of the railway service as contemplated by the terms of the agreement between the Corporation and the Railway Company, the situation in the case at bar would be almost identical with the situation which existed in the case cited, and these by-laws would not require the assent of the electors at the present time, nor would it be necessary that the period during which the rights should subsist should be set forth in the by-laws; but what it is sought to authorize by these by-laws is an extension of the transportation service by means of motor buses, by means of a totally different kind of conveyance from that authorized by the agreement and by-law of the year 1913, to which the electors have assented.

As already stated, I feel that I am precluded by authority from giving effect to the very wide construction of the terms of the franchise agreement which has been urged upon me by counsel for the respondents. I hold that what By-laws 3017 and

3032 have sought to accomplish does not constitute the authorization of a mere extension of the railway service, for which authority is provided by the by-law and agreement of the year 1913 which then received the assent of the electors of the municipality. The recent by-laws constitute a grant to the Railway Company of the right to use or occupy certain highways of the municipality and to operate part of a transportation system in the municipality in a manner not heretofore authorized by by-law. Their effect, therefore, is to grant a new right which can only be granted subject to the provisions of s. 3(1) of The Municipal Franchises Act as amended. There being non-compliance with the provisions of the statute in the two respects mentioned earlier, I have no alternative but to grant the relief claimed by the appellants on this motion.

It is accordingly directed that an order issue quashing the said by-laws. The costs of this motion shall be paid by the respondents to the applicant forthwith after taxation thereof.

*By-laws quashed.*

*Solicitors for the applicant: Lang, Michener, Day & Cranston, Toronto.*

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[WELLS J.]

**The City of Belleville v. The Public Utilities Commission of the City of Belleville.**

*Public Utilities — Municipal Ownership — Respective Powers of Municipality and Municipal Commission—Borrowing by Municipality for Extension of System—Repayment of Debentures—Whether Municipality Entitled to Prescribe Rate to be Collected by Commission—The Public Utilities Act, R.S.O. 1937, c. 286, ss. 25, 31 (as re-enacted by 1944, c. 50, s. 1), 36.*

Where a public utilities commission has been duly constituted under The Public Utilities Act, it has the sole right, so long as a utility remains under its control, to fix the rate to be charged for that utility. The municipality is not entitled, in a by-law providing for the issue of debentures to finance an extension of the utility, to require the commission to impose, during each year of the currency of the debentures, a rate sufficient to pay principal and interest on the debentures. All that is reserved to the municipality by s. 36(4) is the power to provide or refuse to provide money for such works as the commission desires to undertake, and the power to provide money is wholly distinct from the power to fix charges for the supply of a utility. *The City of Belleville v. The Public Utilities Commission of The City of Belleville*, [1943] O.R. 87 at 94, applied.

AN ACTION for a declaration, the nature of which is fully set out in the reasons for judgment.

23rd November 1948. The action was tried by WELLS J. without a jury at Belleville.

*R. A. Pringle*, for the plaintiff.

*Wilfred Judson, K.C.*, for the defendant.

19th May 1949. WELLS J.:—The plaintiff, which is a municipal corporation, brings this action against the public utilities commission of the same municipality, for a declaration as to whether the clauses of certain by-laws passed by the plaintiff bind the defendant Commission. It does not appear to be in dispute that the defendant is a public utilities commission duly established pursuant to The Public Utilities Act, R.S.O. 1937, c. 286, and no question is raised as to its proper constitution under that statute.

Two by-laws, which are in evidence, were passed by the plaintiff on the 28th June 1948. They were both for the purpose of borrowing substantial sums of money upon debentures of the plaintiff, in order to finance additional extensions to the distribution system of the water utility of the corporation of the plaintiff City. The first of these by-laws was no. 5584, the second no. 5593. They contain identical provisions as to the rates to be charged by the defendant Commission. The paragraph in question is as follows:



"5. During the twenty-year period, the currency of the debentures the respective sums set forth in the 5th column of Schedule 'A' hereto, shall be raised annually by the Public Utilities Commission of the City of Belleville, out of revenues arising from the operation of the said water utility, and such sums shall be paid over annually to the Treasurer of the Corporation of the City of Belleville to be used by him for the retirement of such debentures; provided, however, that in default of the above, the said sum shall be raised annually by a special rate, sufficient therefore over and above all other rates to be levied on the ratable property of the Corporation of the City of Belleville."

A declaration is asked that the clause quoted in these by-laws imposes an imperative obligation upon the defendant to fix a water rate sufficient to raise annually the respective sums set forth in the 5th column of schedule "A" to the said by-laws, namely, a sum sufficient to pay principal and interest on the debentures provided for in each of the by-laws in question.

The parties also entered into an agreement made on the 19th September 1948 in which, after reciting that the defendant Commission has questioned the authority of the corporation to provide for the retirement of the debentures as provided in the paragraph which has been quoted, they agree that the question should be submitted to a Court for adjudication at the earliest possible time by the corporation. It was further agreed that pending such adjudication the work should proceed and that funds should be provided by the corporation, without awaiting the judgment of the Court, and there are other provisions as to the providing of the funds if the declarations sought should be adverse to the views of the corporation.

The powers of the plaintiff corporation as to providing a water supply are covered by The Public Utilities Act, R.S.O. 1937, c. 286. By s. 25 of the statute it is provided:

"(1) The council may pass by-laws for the maintenance and management of the works and the conduct of the officers and others employed in connection with them, and may also by by-law or resolution fix the rates or charges for supplying the public utility and the charges to meet the cost of any work or service done or furnished for the purpose of a supply of a public utility, and the rent of or charges for fittings, apparatus, meters or

other things leased or furnished to consumers and provide for the collection of such rates, charges and rents, and the times and places when and where the same shall be payable, and for allowing for prepayment or punctual payment such discount as may be deemed expedient.

“(2) In fixing the rents, rates or prices to be paid for the supply of a public utility the corporation may use its discretion as to the rents, rates or prices to be charged to the various classes of consumers and also as to the rents, rates or prices at which a public utility shall be supplied for the different purposes for which it may be supplied or required.”

Section 31 of the same statute, as re-enacted by 1944, c. 50, s. 1, provides that receipts arising from the supplying of a public utility or from its property, after providing for the expense of its maintenance and operations, shall be paid over to the treasurer of the municipality and applied by him in payment of the amount required to be levied under any debenture by-law of the municipality for the construction, extension or improvement of the utility, and it goes on to provide that it shall not be necessary to levy any rate to provide for sinking fund and interest or other payments on account of such debentures, except to the extent that the receipts paid over are insufficient to meet the annual payments falling due on account of principal and interest of the debentures.

Sections 33, 34 and 35 cover the setting up of a public utility commission such as the defendant in this action, and, as I have pointed out, no question is raised as to the proper constitution of the defendant.

Section 36, however, has considerable bearing on the problem in hand. It is as follows:

“(1) Subject to subsection 4, where a commission has been established under this Part and the members thereof have been elected or where the control and management of any other public utility works are entrusted to a commission established under this Part, all the powers, rights, authorities and privileges which are by this Act conferred on a corporation shall, while the by-laws for establishing the commission or entrusting it with such control and management remain in force, be exercised by the commission and not by the council of the corporation.

“(2) The officers and employees of the corporation shall be continued until removed by the commission unless their engagement sooner terminates.

“(3) Every officer, employee and servant of a commission shall hold office during the pleasure of the commission.

“(4) Nothing contained in this section shall divest the council of its authority with reference to providing the money required for such works, and the treasurer of the municipality shall, upon the certificate of the commission, pay out any money so provided, nor shall anything in this Act divest the council of the rights and powers conferred upon it by *The Local Improvement Act*.”

It is to be noted that, subject to subs. 4, all the powers, rights, authorities and privileges which are conferred on the municipality by the statute shall, during the currency of the by-laws establishing the Commission and entrusting it with such control and management, remain in force to be exercised by the Commission and not by the council of the corporation.

It would therefore seem that the powers conferred on the corporation by s. 25 of the statute which has been quoted, including a power to fix the rates and charges for the supplying of the public utility, rest within the discretion and control of the Commission, and not of the council of the plaintiff municipality.

It is suggested that subs. 4 of s. 36 reserves to the council of the plaintiff corporation not only the power to provide the money, but the authority to provide the method of repayment.

I do not think, however, that subs. 4 goes so far. What subs. 4 does is to reserve to the council of the municipality its power of providing or refusing to provide moneys required for such works as the public utilities commission may desire to undertake. It in no way gives the municipal council any power to do more than to determine whether money is to be supplied or not. If the municipal council is not satisfied with the manner in which the public utilities commission is carrying on, it has its remedy under s. 40 of the Act, whereby it may, by by-law passed with the assent of the municipal electors, repeal the by-law constituting the public utilities commission. All that subs. 4 does is to reserve to the municipal council its control over the provision of capital moneys which may be required.



This matter was authoritatively and thoroughly discussed by Henderson J.A. in a case between these same parties, *The City of Belleville v. The Public Utilities Commission of The City of Belleville*, [1943] O.R. 87, [1943] 1 D.L.R. 424. At p. 94, dealing with subs. 4 of s. 36, the learned judge said:

"The governing provisions of the Act upon the issue raised here are in my opinion found in subs. 4 of s. 36 of The Public Utilities Act. In my view the right of the council to provide moneys for a public utility work or to refuse to do so in its discretion, is strictly preserved, and I can find nowhere anything to authorize a public utilities commission to embark upon the construction of a work, unless it has the money in hand to pay for it or the undertaking of the municipal council to provide such moneys."

Quite obviously the power to provide money is one thing and the power to fix charges for the supply of the public utility is a separate thing entirely. This view is further borne out by the provisions of s. 31 of the statute, which have been summarized above, and which would seem to indicate that there may be a deficit on the operation of the public utility when it provides that it shall not be necessary for the municipality to levy any general rate to provide for sinking fund and interest or other payments on account of such debentures, except to the extent to which the revenues on hand are insufficient to meet the annual payments falling due on them.

Under these circumstances I must conclude that there can be no imperative obligation imposed on the defendant to fix the water rate contemplated by the clauses in the by-laws quoted, and accordingly the declaration asked for must be refused.

The action will accordingly be dismissed. In view of the agreement between the parties, the action will be dismissed without costs, unless such are asked for by the defendant Commission.

*Action dismissed.*

*Solicitor for the plaintiff: Robert A. Pringle, Belleville.*

*Solicitors for the defendant: Daly, Thistle, Judson & McTaggart, Toronto.*

[WELLS J.]

Re Lloyd.

*Executors and Administrators—Duties and Powers—Conversion of Wasting or Hazardous Assets—Basis of Rule—Implied Exclusion by Terms of Power of Investment under Will—Liberal Construction of Such Power—“Investments or securities”.*

The basis of the rule in *Howe v. Earl of Dartmouth*; *Howe v. Countess of Aylesbury* (1802), 7 Ves. 137, as explained in subsequent decisions such as *In re Parry*; *Brown v. Parry*, [1947] Ch. 23, and *In re Chancellor*; *Chancellor v. Brown* (1886), 26 Ch. D. 42, is the presumed intention of the testator that the funds of his estate shall be invested in what are sometimes known as “trustee securities”. If, therefore, the will contains a provision empowering the trustees to go outside such investments, there is no room for the application of the general rule, and no limitation on the amount of income which a life tenant is entitled to receive if conversion is properly delayed.

A power given to trustees to invest in such securities as they think fit will be liberally construed, and a direction that they shall be entitled to invest “in such investments or securities as they shall deem proper, and shall be responsible only for using good faith in so doing” is sufficient to enable them to invest in securities other than those expressly authorized by law for trustees. The words “investments” and “securities” are not synonymous. *In re Rayner*; *Rayner v. Rayner*, [1904] 1 Ch. 176; *In re McEacharn’s Settlement Trusts*; *Hobson v. McEacharn*, [1939] Ch. 858; *Re Harari’s Settlement Trusts*; *Wordsworth v. Fanshawe*, [1949] 1 All E.R. 430, applied.

*Infants—Powers and Rights of Guardians—Receipt of Income Accruing to Infant under Will—The Infants Act, R.S.O. 1937, c. 215, ss. 17, 20.*

It is clear from ss. 17 and 20 of The Infants Act that the intention of the statute is that guardians appointed under the Act, unless their powers are expressly limited, are to act *in loco parentis* for their wards, and in such circumstances it is right and proper that they should have the management and control of the infants’ income. Where, therefore, infants are entitled to a share in the income of an estate, the executors must pay that share to guardians duly appointed.

A MOTION for the opinion, advice and direction of the Court.

8th April 1948. The motion was heard by WELLS J. in Weekly Court at Toronto.

G. W. Mason, K.C., for the executors.

J. D. Arnup, for the residuary legatees.

F. J. MacRae, K.C., for Edna Lynd and Lloyd Lynd.

P. D. Wilson, K.C., Official Guardian, for the infants.

19th May 1949. WELLS J.:—This is an application made on behalf of the surviving executors of the last will and testament of Charles Victor Lloyd, deceased, for the advice and direction of the Court on the following questions:

“1. Should or should not a portion of the net profits (after payment of all taxes in respect thereof) of the wholesale business carried on by the surviving executors and trustees under the name of James Lloyd & Son have been capitalized?

"2. If the answer to question 1 is in the affirmative, were the executors and trustees right in applying to or for the benefit of the children of the deceased under paragraph XIII of the will of the above-named deceased an amount equal to 5% of the book value of the capital investment in the said business carried on under the name of James Lloyd & Son? If not, what amount should have been so applied?

"3. Are the surviving executors and trustees given a discretion under paragraph XIII of the said will to pay or expend in any year an amount less than the whole of the income from the residue of the estate to or on behalf of the said children?

"4. Are the surviving executors and trustees required to pay the income from the residue of the estate to the guardians of the said infants appointed by the Surrogate Court?"

After the conclusion of the original argument I felt it desirable to ask for certain further information, at which time counsel indicated that they wished to re-argue certain points. This re-argument took place during the late fall of last year and the matter has since stood for judgment.

These questions arise out of the directions given by the deceased in his last will and testament in respect of a wholesale grocery business carried on by him in his lifetime and which was not incorporated, and it is substantially in respect of the income from the business that the questions arise. No question arose during the lifetime of the widow of the deceased who was also one of the executors. On her own behalf she entered into an agreement with the executors to accept, as income from the business, interest at the rate of 5 per cent. per annum on a capitalization agreed upon, and during her lifetime the balance of the profits from the business in each year were capitalized to protect the interest of the estate in the business and to provide a reserve. It would appear from the agreement, which is an exhibit to one of the affidavits filed, that the income received by the late Mrs. Lloyd was a sum equivalent to 5 per cent. of the book value of the capital employed by the executors in the operation of the business at the beginning of each year. No question arose therefore during Mrs. Lloyd's lifetime. She, however, died on the 3rd May 1944, and the deceased's children then became entitled to the income under the will.



The questions are asked in respect of the profits of the business between Mrs. Lloyd's death and the day on which it was sold, which was the 9th April 1946. It would appear that the total income of the business from the date of Mrs. Lloyd's death to the end of 1944 was the sum of \$7,700.97, and the net income from the business for the year 1945 was \$14,876.58. The earnings during the period in 1946 up to the 9th April in that year, when the business was sold, are not disclosed but they are no doubt readily available. It would appear from the material that only a portion of the income was paid to the infant children of the deceased after their mother's death and the balance is still held by the executors.

Apparently the procedure followed with the late Mrs. Lloyd was followed with respect to the children and no application was made to the Court for a determination of the questions now raised until nearly two years after the business was in fact sold.

The first question asked really raises the question whether the rule of the Court of Chancery known as the rule in *Howe v. Earl of Dartmouth*; *Howe v. Countess of Aylesbury* (1802), 7 Ves. 137, 32 E.R. 56, should apply to the particular circumstances in this case. It is said that where property comprised in a settlement is of a wasting or hazardous nature, equity will intervene in order to deal evenly with the beneficiaries in such a case and that equity requires the trustees to realize these wasting or hazardous assets and to invest the proceeds in trustee securities. Moreover, if the conversion is delayed, and there is no suggestion here that it was improperly delayed, because authority to do so was given the executors by the testator, the life tenant is permitted to receive as income only so much as would have been produced had the properties been converted into proper trustee securities. Any surplus income is to be retained by the trustees as capital and invested by them in trustee securities or in accordance with the directions of the will. It would also seem to be clear on the authorities that all residuary personalty is deemed to be hazardous if it is not a trustee investment authorized by law or by the terms of the will. The provisions in this will as to the business are found in para. IX and are as follows:

"I direct my executors and trustees herein named to carry on my business if in their opinion they deem it meet so to do, and for that purpose to employ servants, agents and workmen

for the purpose of winding it up and disposing of the assets to the best advantage according to the discretion of my executors, but if feasible it should be sold as a running concern. In conducting such business, my executors shall not be responsible for any loss thereby incurred."

The directions as to investment are contained in para. XVIII and are as follows:

"I hereby empower my executors and trustees to sell any investments forming part of my estate which I may have made in my lifetime and to invest the funds derived therefrom in such investments or securities as they shall deem proper, and shall be responsible only for using good faith in so doing."

If this investment clause has no application to the proceeds of the sale of the business, which the testator dealt with in para. IX of his will, or if in terms it does not give the trustees a wider power of investment than they would normally have, the rule I think must clearly apply unless there is an indication by the testator in his will that the rule was not to apply to the payment of income. A trading business such as that left by the testator at his death is not ordinarily the type of investment in which trustees are authorized by law to invest.

The rule itself arises out of two decisions of Lord Eldon given some three days apart and which are both reported in the same volume of Vesey Junior's Reports. The first of these was the decision in the case of *Gibson v. Bott* (1802), 7 Ves. 89, 32 E.R. 37, where there was a trust to convert. The second decision was the case of *Howe v. Earl of Dartmouth*, *supra*, which has subsequently given its name to the rule. In that case there was no specific direction as to conversion. A most comprehensive examination of this rule is found in the recent judgment of Romer J. in the case of *In re Parry; Brown v. Parry*, [1947] Ch. 23, and while the point in that case was as to the time at which the rule should apply there is a most valuable examination of the origin and limitations of the rule. The rule arose out of the desire of the Court to deal fairly with all the beneficiaries of a settlement and, as has been said, if the will imposes a trust to convert, equity merely adds its rules designed to prevent injustice during the period which will elapse before the desired conversion is carried out. Whether the rule applies or not must always depend on the testator's intention as expressed in his will. It

applies unless some expression of his makes it clear that he intended other considerations to govern. An examination of the will is therefore always necessary.

This preliminary question was well discussed in the case of *In re Chancellor; Chancellor v. Brown* (1884), 26 Ch. D. 42. There is some similarity in the circumstances since in that case, as in the case at bar, the principal asset of the deceased was his business as a wholesale provision merchant. The judgment of Cotton L.J. at p. 45 of the report is of interest:

“Now this is the will of a trader, and undoubtedly the general rule is that where property is invested on a security of a wasting character that must be realised, or, if not realised immediately, then the tenant for life is only entitled to interest on the realised value. But a testator can say what he likes, and if he chooses to say that the investment may be continued, or the sale of it may be postponed, and that the profits arising from such security in the meantime shall be paid to the tenant for life, he can do so. The question is whether the testator has said so. Here the testator has given his real and personal estate to trustees upon trust to sell and convert, and to invest the proceeds, and to pay the income to his wife during her life, or until she shall marry again. Then he empowers his trustees to postpone the sale and conversion of his real and personal estate. [His Lordship read the clause, and continued:] Now, in the first place, that clause must apply to this business, which was the greater part of his personal estate. That being so, the trustees had power to postpone the sale of the business, not for the purpose of carrying it on to make profits, but to carry it on for such a reasonable period as would enable them to sell it profitably as a going concern. Here it is not suggested that the trustees have acted improperly. Then is the widow to have the profits? The testator says, ‘the rents, profits, and income which shall accrue after my death from such part of my real and personal estate as shall for the time being remain unsold shall, after payment thereof of all incidental expenses and outgoings, be paid to the person or persons to whom the income would for the time being be paid if such sale had not actually been made.’ Now it is quite true that the discretionary powers exercised by trustees are not to affect the rights of beneficiaries, but when a testator himself expressly directs what shall be done with the income accruing during the



period the sale is postponed, the general rule does not apply, and we are at liberty to give effect to the plainly expressed intention of the testator. If there had been no such direction here, no doubt the general rule would have applied, and the widow would only have been entitled to interest at 4 per cent. on the income of the business. But here the testator has said what she is to have if the trustees exercise their discretion. In my opinion, therefore, without impugning any of the authorities that have been referred to, there is in this will an implied authority to the trustees to carry on the business, and the testator has said how the profits of the business pending a sale are to be paid and applied. I am, therefore, of opinion, that the net profits arising from this business are income, and are payable to the widow."

Reading the will as a whole, while for the most part it is very clearly expressed, it would, however, appear to me to have been drawn by the testator without the benefit of much professional advice. It is quite obviously the will of a business man who knew his own mind and had a rather complete grasp of what he wanted to do with his own property. It cannot, however, be said on any fair reading of the will that any intention is shown such as that noted by the judges who decided *In re Chancellor, supra*, sufficient to take the administration of this estate out of the operation of the rule in so far as the payment of income to the widow at least is concerned. The direction as to the payment of income to the widow, who is the first life tenant, is a simple direction covering the remainder of the testator's estate after legacies are paid, directing payment of the income to the wife so long as she shall remain the testator's widow.

The next clause, which is para. XIII, deals with the situation on the widow's remarriage or death, and it directs that then: "the whole of my estate then in the hands of my executors shall be held in trust for the purpose of paying the income therefrom to or expending the same for the benefit of my child or children while under the age of twenty-five years, and upon their respectively attaining the age of twenty-five years, to pay the whole principal to such child or children in equal shares if more than one."

There is subsequently a provision that should the child or children not attain the age of 25 years, or should they not be

living at the time of the widow's death or remarriage, and if they leave no issue surviving at the death or remarriage of the widow, then the estate is to go in equal shares to certain brothers and sisters.

In all this, however, there is, I think, no special intention indicated which would operate to take the payment of income from the testator's estate out of the operation of the rule, unless the direction to pay the children the income from "the whole of my estate then in the hands of my executors" can be so construed.

The matter, however, does not rest there. It is necessary to examine the purpose of the rule. As originally laid down it was expressed by Lord Eldon in the two cases which, as I have already mentioned, were decided within a few days of each other; the first, *Gibson v. Bott*, *supra*, was heard on the 18th May 1802. In that case the testator made a general residuary bequest to his executors upon trust, as is set out in the report, at p. 90: "that they shall and do, as soon as conveniently may be after his decease, make sale and absolutely dispose of and convert into ready money all such parts thereof as shall not consist of money or of monies already invested by him in the public funds; and upon farther trust, that they shall place out and invest all such sum and sums of money as shall arise by such sale and conversion into money as aforesaid; and also all such parts of the said residue of his estate and effects as shall consist of ready money, or be hereafter got in and received, in the public funds, or upon real or Government securities, at interest, in his or their own name or names as to his said executors or trustees shall seem meet".

The assets of the estate included a leasehold farm with stock, and the stock was considerably increased between the death in April and the sale at Michaelmas. There was no criticism, however, of the time taken to effect this sale as it was held to be within a reasonable time. It appeared, however, that the leasehold, because of a defective title, could not be sold, and in dealing with this, the Lord Chancellor said at p. 97:

"The utmost, that can be contended by the Plaintiffs is, that what is directed to be done shall be considered as done. They can only therefore claim interest upon the capital, as it was at the death." Later he said:

"As to the leasehold premises, that could not be sold, they cannot be considered otherwise than as property, which it was for the benefit of all parties to suffer to remain *in specie*; upon that I think the Plaintiffs may have interest upon the value from the death; for there is a consideration for that. The best decree in this cause will be to declare, that the property to be converted has been converted in a reasonable time; that the persons entitled for life shall have the interest from that conversion; and as to the other leasehold premises, that it being for the interest of all parties, that they should not be sold, a value shall be set upon them; and the persons entitled for life shall have interest at 4 *per cent.* upon that value from the death of the testator."

Some three days later Lord Eldon decided the case of *Howe v. Earl of Dartmouth*, *supra*, which is reported in the same volume, at p. 137. Here there was no trust or express direction for conversion but successive interests were created by Lord Strafford's will in his general personal estate. The first life tenant, Lady Anne Connolly, had received in her lifetime the full annual proceeds of the estate and her right to do so was in question before Lord Eldon on the ground that the tenants for life of such funds as bank annuities and long and short annuities were not entitled to the enjoyment of them in specie, but there was a standing rule of the court for the benefit of all parties interested, that those funds should be laid out in the more equal fund, the 3 per cents; and that no party ought to suffer by the circumstance that what ought to have been done, and what the Court would have directed to be done, immediately on the testator's death, was not done. It was quite clear that the securities in which the estate was invested were not such as the Court then regarded as proper investments for trustees. After pointing out that the rule he was applying did not apply to devises of land, the Lord Chancellor considered the whole problem at p. 147 of the report. As he said:

"But it is quite different as to personal estate. The question must be, did he mean to dispose of what he had at the date of the will, or of that, which he should have at his death? If he meant the former, then every part of that identical personal estate, which is disposed of between the date of the will and the death, is a legacy adeemed; *pro tanto* it is gone. If the



question is, whether those subjects, to be acquired between the date of his will and his death, should pass, I cannot say, he did mean that. If not, it can only be specific thus; that the persons to take the personal estate he should have at his death in different interests should enjoy it as he left it. Not one word of this will goes to that. It is given as all his personal estate; and the mode, in which he says it is to be enjoyed, is to one for life, and to the others afterwards. Then the Court says, it is to be construed as to the perishable part, so that one shall take for life, and the others afterwards; and unless the testator directs the mode so that it is to continue, as it was, the Court understands, that it shall be put in such a state, that the others may enjoy it after the decease of the first; and the thing is quite equal; for it might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency perhaps. If in this case it is equitable, that Long or Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are for the sake of the tenant for life to be converted into a present interest; being sold immediately, in order to yield an immediate interest to the tenant for life. As in the one case that, in which the tenant for life has too great an interest, is melted for the benefit of the rest, in the other that, of which, if it remained in specie, he might never receive anything, is brought in; and he has immediately the interest of its present worth.

“As to the annuities charged upon this estate, the tenant for life, if entitled to the whole, would be properly paying out of the aggregate property the annuities. But it would be great injustice to those in remainder, if these capital sums were paid out of that part of the bulk of the property, which does not consist of perishable interests; and were not to be thrown in proportion upon the perishable part. The ordinary rule of apportioning requires, that in some degree a provision should be made out of those, the Short Annuities, if they remain, and not out of the 3 *per cents.* only.

“The cases alluded to, where personal estate has been taken to be specifically given, do not apply. First, where a residuary legatee takes it as a specific gift, not subject to debts, the

inference, that he is to take that personal estate, is not made in general cases upon the bequest of all the testator's personal estate, but upon the effect of that, connected with what arises out of other parts of the will, with regard to the intention to fix upon other funds charges, that would primarily fall upon that fund and that must be made out, not by conjectures, but by declaration plain, or manifest intention. That is the principle, upon which it is agreed these cases are to be construed; and the intention has never been considered manifest merely from a disposition of the personal estate in the same clause with land; which must be taken to be specifically given. But those cases do not go the length, that, if the enjoyment is portioned out in life interests, with remainders over, it is specific. I am clearly of opinion therefore, that this is not a case, in which the personal estate is in this sense specifically given, with a direction, that it shall remain specifically such as it was at the testator's death; and the purposes, for which it is given, are those, for which it is admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital, bearing interest.

"I was astonished, when that was doubted, from general recollection. I had considered the practice to be, that the first moment the observation of the Court was drawn to the fact, the Court would not permit property to be laid out or to remain upon such funds under a direction to lay it out in Government securities; but would immediately order it to be converted into that, which the Court deems for the execution of trusts a Government security. . . .

"The question then is, whether the Court will change the fund, not as between the remainder-man and the executor, but in a question between the tenant for life and the remainder-man; and the question with the executor cannot well arise, so as to be acted upon, till a failure by the tenant for life, or those, who represent him; for the justice of the case, if the tenant for life has received so much, would be, that he should bring it back in case of the executor, who paid him. . . . But, if the principle is, that the Court, when its observation is thrown upon it, will order the conversion, it ought to be considered to all practicable purposes as converted, when it could be first converted. That is the genuine inference from the other prin-

ciple. If the Court has ever attended to the difficulties, often thrown before it, with regard to perishable property of other kinds, as leasehold estates, &c. it never has as to stock. . . . You can learn the price, at which it might be converted on any day; and the moment the Court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value."

And finally he observed: "The account therefore must go . . . from the time, at which it would have been converted, if the observation of the Court had been drawn to the fact, that the executors were possessed of those funds."

In the judgment of Romer J. already alluded to in *In re Parry; Brown v. Parry, supra*, after considering these cases and certain others, he said at p. 39:

"The conclusions to be drawn from these authorities are, I think, as follows. Where residuary personalty was settled by will, and there was no sufficient indication that the testator intended the income beneficiaries to enjoy the property in specie, the court sought to do justice between all parties and to preserve that balance which the testator presumably intended and would have expressly directed had his mind been addressed to the question. As an essential element in this endeavour it was early recognized that a hypothetical conversion of hazardous or wasting property into safe and lasting securities should be assumed, in cases where it had not been converted in fact. There was no difficulty as to this in cases where there was an express trust for sale."

The principles here enunciated are, of course, dependent on the presumed intention of the testator that the funds of the estate should be invested in what, for lack of a more comprehensive term, are sometimes known as trustee securities. The difficulty in the present case, however, is the view I have reached that the directions as to investment in this will do not so limit the trustees. The investment clause, which is separate from the clause dealing with the business, empowers the executors and trustees "to sell any investments forming part of my estate which I may have made in my lifetime and to invest the funds derived therefrom in such investments or securities as they shall deem proper, and shall be responsible only for using good faith in so doing".



It is to be noticed that the power given the trustees includes a power to invest the funds in "investments" and "securities". These words are not, as I apprehend it, synonymous. The word "investment" would connote a wider field to my mind than the word "security". It might well authorize the trustees to invest in the common stocks of limited companies if they exercised due care and caution in so doing. Powers of a similar nature have been considered in a number of cases. Theobald on Wills, 10th ed. 1947, at p. 323, points out that: "A liberal construction will be put upon a power to trustees to invest in such securities as they think fit." Here the power is not limited to putting funds of the estate in securities, but the word "investment" is also used. The word "investment" is defined in Murray's New English Dictionary as: "The conversion of money or circulating capital into some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business." It is alternatively defined as "An amount of money invested in some species of property", and this definition is carried forward into the Shorter Oxford English Dictionary.

The matter has been considered in a number of cases, a typical one of which is *In re Rayner; Rayner v. Rayner*, [1904] 1 Ch. 176. In that case the direction was that "all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit", and there was a power to continue or leave any moneys invested at the testator's death in the same securities. The Court of Appeal considered, taking the whole clause together, that the word "securities" was not limited to money secured on property, but was synonymous with the wider term "investments", and that the word "security" was relative to the circumstance and that in consequence the trustees could properly invest in railway shares. Romer L.J. said at p. 190: "I think there is enough in the will in question to shew that the testator had used the word 'securities' in the sense of 'investments.'" Obviously the Court was of the opinion that the word "investment" covered shares and stock in corporations.

In the will under consideration I doubt if the words mean the same thing, but they are alternative, and of course the word "investment" in the enabling clause must, I think, bear

the same meaning as the word "investment" in the earlier part of the clause in respect of which a power of sale is given, and the significance of this in the case of this testator is even more apparent when it is realized that his principal investment was the trading business to which he specifically referred in para. IX of his will.

Another case in point is that of *In re McEacharn's Settlement Trusts; Hobson v. McEacharn*, [1939] Ch. 858. In that case the authority to invest was to invest the trust funds in such "stock funds and securities as they [the trustees] shall think fit." Bennett J. held that this gave a power to invest in the fully-paid shares of a limited company. In the later case *Re Harari's Settlement Trusts; Wordsworth v. Fanshawe*, [1949] 1 All E.R. 430, Jenkins J. held that words authorizing the trustees to reinvest in such "investments as to them may seem fit" enabled them to invest in any investments which seemed fit to the trustees whether or not they were investments authorized by law for the investment of trust funds. This decision is particularly useful for its review of some of the pertinent authorities bearing on this problem.

As I view the will under consideration, the testator clearly intended that his executors and trustees should have a wider power of investment than that given to trustees by law. It might, I think, be argued that this clause was not intended to apply to the proceeds realized from the sale of the testator's business. I do not think, however, that this can have been the testator's intention. From the material filed before me, it is quite evident that the testator's business was a very large and substantial part of the estate, in fact the principal asset he possessed, and in the view I take of his will the specific directions as to the carrying on of the business and its ultimate realization and sale were intended by him, in so far as powers of reinvestment went, to be subject to para. XVIII of the will, which in terms, of course, is wide enough to cover the moneys he had invested in his business. While he gave specific directions about his business, I do not think that he could have intended to omit directions as to the investment of the proceeds of the sale of the business which was his principal asset, and, in my view, para. XVIII was meant by the testator to cover the proceeds of the sale of the business, as well as any other of his assets.

Now, it would seem to me that if my construction of the meaning of the testator is correct, then at no time was it necessary for the trustees to invest in securities authorized by law for the investment of trust funds, and it would be quite possible that, if they acted in good faith, the moneys realized from the sale of the business could quite lawfully have been invested by them in securities of trading and other limited companies or businesses which might well come within the description of securities of a wasting or hazardous nature under the development of the rule in *Howe v. Earl of Dartmouth*, *supra*. If this is so, and if the investment clause is as wide as I conceive it to be, then the whole basis for the application of the rule, which is that the Court deems that what should have been done has been done, falls to the ground. It would appear to me accordingly that the rule can have no application to a testamentary document such as the one under consideration, where the type of investment into which the trustees may put the funds of the estate is not limited to those investments approved by law for trustees. Under these circumstances I must hold that the rule does not apply to the particular provisions of this will because its whole purpose is avoided by the wide powers of investment given to the trustees. In consequence of this the answer to the first question asked is "No". In view of this answer it becomes unnecessary to answer question 2.

In respect of question 3, under para. XIII of the will, which deals with the right of the children of the deceased to income, the direction is: "the whole of my estate then in the hands of my executors shall be held in trust for the purpose of paying the income therefrom to or expending the same for the benefit of my child or children while under the age of twenty-five years, and upon their respectively attaining the age of twenty-five years, to pay the whole principal to such child or children in equal shares if more than one." It is to be noticed that there is no direction as to income on the attaining of the age of 25 years, and I think it must be assumed that the testator intended that his children should have the benefit of the whole income to which they were entitled from his estate. He did not contemplate that there would be any income not paid over when the child or children became entitled to the principal. He even contemplated that the children might require payments out of



corpus for their benefit and this is provided for in para. XV of the will. While, for reasons that are not apparent, the trustees have apparently been very loath, and have not in fact, paid the income to the children or used it for their benefit, I can see no basis on which the testator intended them to exercise any powers of withholding the same. The answer to question 3 is therefore "No".

This leaves the final question as to the persons to whom the income is to be paid. Apparently guardians for the infant children were appointed under the provisions of The Infants Act, R.S.O. 1937, c. 215, at their mother's death. It is to be noted that by s. 17 of The Infants Act guardians must file bonds, and that they are liable to render a just and true account of any of the infant's estate which shall have come into their hands. It is also to be noted that under s. 20 of the same statute guardians properly appointed, unless otherwise limited, shall have a general authority to act for and on behalf of the infant, and shall have charge and management of the infant's estate, real and personal, and the custody of his person and the care of his education.

Under the circumstances I think it was the intention of the statute that guardians so appointed, unless their powers are limited, which is not the case here, are to act *in loco parentis* for the infants, and under these circumstances I think it proper that they should have the management and control of the infants' income. The answer to question 4 will therefore be "Yes".

It would seem to me that the matter brought before the Court in this application was a proper matter to bring before the Court, and the only criticism I would have of the trustees was that they waited some two years before bringing it. However, it could doubtless have been brought before the Court by the infants' guardians if they had thought it advisable, and I make no comment on this delay as the reasons for it are not apparent to me and they may have been excellent ones. Under all the circumstances I think the costs of all parties should be out of the estate, those of the executors and trustees as between solicitor and client.

*Order accordingly.*

*Solicitor for the executors: W. E. Goodwin, Stratford.*

[LEBEL J.]

**Shortell v. Fitzpatrick.**

*Fraud and Undue Influence—Burden of Proof—No Position of Domination Established—Absence of Power of Revocation or Independent Advice.*

Even where the relationship of the parties to a conveyance is not one of those (husband and wife, solicitor and client, etc.) which by their very nature establish a position of confidence, so that the burden lies on the person who is in the position of confidence to show that the transaction is fair (*Hatch v. Hatch* (1804), 9 Ves. 292 at 297; *MacKenzie v. Royal Bank of Canada*, [1934] A.C. 468 at 475, referred to), the rule as to the burden of proof will apply if it is shown that one person is in a position to exercise domination over another. *Huguenin v. Baseley* (1807), 14 Ves. 273; *Dent v. Bennett* (1839), 4 My. & Cr. 269; *Tate v. Williamson* (1866), L.R. 2 Ch. 55; *Vanzant v. Coates* (1917), 40 O.L.R. 556, applied.

Where, however, no such relationship exists, and the parties are on equal terms, the burden is on the person who attacks a transaction to establish affirmatively that there has been active fraud or undue influence (which amounts to fraud). *Blackie v. Clark*; *Cock v. Clark* (1852), 15 Beav. 595; *Toker v. Toker* (1862), 31 Beav. 629, referred to. In such circumstances the fact that there is no provision for revocation if the grantee does not abide by his covenant in favour of the grantor is not conclusive, but is to be taken into account as a matter of evidence, having more or less weight according to the circumstances. *Hall v. Hall* (1873), L.R. 8 Ch. 430; *Powell v. Powell*, [1900] 1 Ch. 243, referred to. The same is true of the absence of competent independent advice, which is as immaterial as mere inadequacy of consideration if the parties are on equal terms. *Harrison v. Guest* (1855), 6 DeG. M. & G. 424; *Rhodes v. Bate* (1865), L.R. 1 Ch. 252; *Lyon v. Home* (1868), L.R. 6 Eq. 655; *Morley v. Loughnan*, [1893] 1 Ch. 736, applied.

AN ACTION to set aside a deed and a bill of sale.

17th, 20th, 21st and 22nd December 1948. The action was tried by LEBEL J. without a jury at Kingston.

*H. F. Gibson*, for the plaintiff.

*W. M. Nickle, K.C.*, for the defendant.

25th May 1949. LEBEL J.:—The plaintiff, who is sole heir and next-of-kin of her father Michael J. Shortell and the administratrix of his estate, sues for a declaration that a deed and a bill of sale, each dated 7th April 1948, are fraudulent and void; also for an accounting from the defendant, for an injunction, and for possession of the farm lands and chattel property described and referred to in the two disputed documents. By an injunction effective to the date of the trial or other final disposition of this action, the defendant is restrained from removing or destroying or otherwise disposing of the chattel property, and a *lis pendens* has been registered against the said farm lands.

The deed, which was executed by the late Michael J. Shortell as grantor upon the date it bears, is in favour of himself and the defendant as joint tenants. The bill of sale is in favour of the defendant alone and it covers all the livestock, farm implements, machinery, household goods and furniture, and farm produce on the lands. The deed contains the following covenant:

“And the said Brennan Fitzpatrick covenants with the said Michael J. Shortall [*sic*] that he will remain on the farm and diligently perform all farm operations, and operate the farm as heretofore, and will also provide the said Michael J. Shortall with a home and care for as long as he lives.”

The two documents were registered and filed, respectively, on the day following their execution.

The plaintiff alleges that both documents were improvident and that at the time of the making of the same the late Michael J. Shortell was under the influence of the defendant or his agents; that the defendant or his agents fraudulently exercised influence or control over him, inducing him to execute the documents at a time when he was unable to appreciate their nature, quality and consequences. She also alleges that there was no consideration for the deed or bill of sale and avers that the late Michael J. Shortell did not have independent legal advice.

The defendant denies all these allegations and sets up a contract between the late Michael J. Shortell and himself whereby he was to be given the farm, either by deed or by will, in return for his staying and working on the farm, and alleges that the late Michael J. Shortell executed the two documents as his free and voluntary act.

Michael J. Shortell, at the date of his death on 17th July 1948, was 81 years of age. About three years after his marriage many years ago he brought his wife to the farm lands which are in question in this action and the couple lived out their lives there. The wife's mother, Matilda Dowling, resided with them there for a number of years until her death in 1944. Mrs. Dowling had owned part of said lands, a parcel comprising some 20 acres, and had left it to her daughter, Mrs. Shortell, for life with remainder over to her granddaughter, the plaintiff. The rest of the farm, comprising some 150 acres, Michael J. Shortell owned and worked for many years. He also worked the 20-acre parcel owned by the late Mrs. Dowling. The plaintiff now pleads that



this parcel, which is vacant land, is hers under the will of her grandmother and that the defendant is not entitled to make use of it. The defendant's pleading is silent as to this allegation but his counsel said something in argument about Michael J. Shortell having acquired title to this parcel by possession, which argument, however, he did not seem to press. In the circumstances here there could be no adverse possession such as is necessary to establish such a title and, in any event, the 20-acre parcel could not belong to the defendant since it is not included in the lands described in the disputed deed. In my opinion there can be no question but that it now belongs to the plaintiff.

The plaintiff was 34 years of age at the time of the trial. She is not married and is an only child. She lived with her parents and her grandmother on the farm until 1939, when she obtained employment with the Civil Service Commission in Ottawa and went to live in that city. In 1943 she relinquished her position in Ottawa and returned home where she stayed for only about two weeks. She then secured employment, presumably with the Civil Service Commission again, and commenced work in the Income Tax office at Kingston, which is about six miles distant from the farm in question in this action. She continued to be so employed down to the time of the trial and I assume is still so employed. She maintained a room in Kingston and she also had a room in her parents' home which she kept locked at least part of the time. She came to the farm over many week-ends and often over night during the week, except when the weather was inclement, but she never returned to live there permanently. In 1944 her grandmother died and in August 1947, after a short illness, her mother also died. Thereafter her father, the defendant and an old man, Billy O'Neill, who had worked on the farm for a great many years—and until, I gather, he was no longer able to do so—continued as the only permanent residents in the farm dwelling.

The defendant, who was born in England about 33 years ago, was sent to Canada by the Catholic Emigration Association of Birmingham. When he was 13 years of age the Association's Ottawa office made some arrangement with Michael J. Shortell which resulted in the defendant's coming to work for him on the farm. Until he was 18 years of age the small wage the defendant earned was sent to and kept by the Association, I presume by way

of repayment for the outlay it had made on his behalf. From that time on the Association retained the wages it received from Mr. Shortell for the defendant until he attained his majority, when it paid him the amount accumulated. Except for an absence of a few days on two or three occasions the defendant remained with the late Michael J. Shortell, doing the work of a hired farm hand, until the latter's death. He lived with the family and ate at table with them over the 20-year period, but he never attended school after he came to the farm or had a chance otherwise to improve upon his rudimentary education.

[The judgment here reviews in detail the evidence as to the physical and mental condition of the deceased, who suffered from a heart condition and arteriosclerosis, diagnosed in January 1948, and the circumstances in which the deed and bill of sale were drawn and executed on 7th April 1948. On 6th April the deceased and the defendant were driven by one Gordon to Kingston, where they first called at the office of the deceased's physician, who examined him and gave him a certificate that he was "physically and mentally able to make a will". They then went to the office of H. F. Gibson, a solicitor, and Shortell said that he wished to make a will leaving the farm to the defendant. Gibson refused to act in the matter, apparently on the ground that he thought the deceased was being unduly influenced. The men then went to the office of Messrs. Herrington and Slater, where they interviewed both partners. Herrington, who had known the deceased before, reminded him of his daughter's claim and telephoned the plaintiff in his presence. He then advised him to think the matter over and return later. He said at the trial that he suspected that the deceased was being influenced. On the following day Gordon drove the deceased and the defendant to the office of another solicitor, C. R. Webster, who suggested the giving of a deed, containing a covenant by the defendant, rather than the making of a will. The papers were drawn in accordance with this advice, and executed.]

I have concluded upon the whole of the evidence that though confused, forgetful and even fanciful at times, as a result of arteriosclerosis, the late Michael J. Shortell wished the defendant to have the farm and its assets after his death, and that he well understood on 7th April 1948 that what he proposed to do and actually did that day had that legal effect. I appreciate

that that finding does not dispose of the question of undue influence, because a person may well understand what he is doing and yet act as a result of influence exerted upon him. When considering the question of mental incapacity I think the following passage in Kerr on Fraud and Mistake, 6th ed. 1929, pp. 154-5, is appropriate:

“Independently of that degree of imbecility which will render a man legally *non compos*, a conveyance may be impeached for mere weakness of intellect, provided it be coupled with other circumstances to show that the weakness, such as it is, has been taken advantage of by the other party; but the mere fact that a man is of weak understanding or is in intellectual capacity below the average of mankind, if there be no fraud, or no undue advantage be taken, is not of itself an adequate ground to set aside a transaction.”

I think I have already said sufficient about the relationship between the late Michael J. Shortell and the defendant to enable me to observe at this point that it is not one the very nature of which establishes a position of confidence as do the relationships of solicitor and client, physician and patient, confessor and penitent, and others. In those special cases the Court has always regarded the particular transaction with jealousy—“a jealousy almost invincible” in the words of Lord Eldon in *Hatch v. Hatch* (1804), 9 Ves. 292 at 297, 32 E.R. 615. They are called cases within the class of “protected persons” by Lord Atkin in *MacKenzie v. Royal Bank of Canada*, [1934] A.C. 468 at 475, [1934] 4 D.L.R. 1, [1934] 2 W.W.R. 620. The learned editor of Pollock on Contracts, 12th ed. 1946, at p. 476, calls them cases of “suspected relations”. The former appellation has regard, of course, to the legal position of the donor. The equitable rule applicable in these special cases of suspected relations has been expressed differently in the different authorities dealing with this branch of the law, but I think it may be said that in such cases the burden of proof lies upon the party who fills the position of confidence to show that the transaction has been fair, and he must take upon himself the whole proof that the thing is righteous. How and when this burden may be said to be discharged appears to vary with the circumstances.

The rule is not, however, confined in its application to those special cases of “suspected relations”. In *Huguenin v. Baseley*



(1807), 14 Ves. 273, 33 E.R. 526, the argument appears first to have been advanced that "The relief stands upon a general principle, applying to all the variety of relations, in which dominion may be exercised by one person over another". In the circumstances of that case it was unnecessary to approve of the proposition, but it was afterwards expressly approved by Lord Cottenham in *Dent v. Bennett* (1839), 4 My. & Cr. 269 at 277, 41 E.R. 105, and it has never been challenged successfully since. It is stated as follows by Lord Chelmsford in *Tate v. Williamson* (1866), L.R. 2 Ch. 55 at 61:

"Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

In *Vanzant v. Coates* (1917), 40 O.L.R. 556, 39 D.L.R. 485, Ferguson J.A. at p. 563 after reviewing many authorities, has this to say in speaking of the application of the equitable rule:

"... the Courts have not limited the application of the rule to any particular defined relationships or sets of circumstances, nor have they differed materially as to its application to any case where it is shewn that *the donee is in a position to exercise influence, natural, legal, or otherwise*, but . . . they have required different strengths and kinds of evidence in one relationship, or set of circumstances, to that required in another relationship, or set of circumstances, to satisfy the Court that the act of gift was voluntary and deliberate, and not the result of influence." (The italics are mine.)

I am satisfied upon the evidence that the defendant was at no time "in a position to exercise influence, natural, legal or otherwise" upon the late Mr. Shortell. There was never, in my opinion, a confidential relation between the two men in the sense that the defendant ever exercised dominion over the old gentleman. In my judgment all the evidence points the other way. It is clear that Mr. Shortell possessed a will of his own even after his illness overtook him and that he did not hesitate

to assert it whenever the occasion required. Any inequality of footing that there may have been between the men in business matters was in favour of the late Mr. Shortell, in my opinion—and this notwithstanding his illness. The Court will not presume, upon the relation between the parties in a case like the present, confidence put and influence exerted. The confidence and the influence must, in a case like this, be proved affirmatively by the party who impeaches the transaction: see *Blackie v. Clark; Cock v. Clark* (1852), 15 Beav. 595, 51 E.R. 669; *Toker v. Toker* (1862), 31 Beav. 629, 54 E.R. 1283.

It remains only to consider whether the decision which Mr. Shortell made in the defendant's favour was influenced improperly or unduly by the defendant or anyone acting in his interest. The plaintiff asserts actual undue influence on the part of the defendant and of William Gordon, the man who drove Mr. Shortell and the defendant in succession to the offices of Dr. Brown, Mr. Gibson, Messrs. Herrington and Slater and Mr. Webster, and who recommended the lawyers in turn to Mr. Shortell. The onus is upon the plaintiff to prove her assertion extrinsically and it must be remembered that active undue influence is actual fraud. When that is proved, of course, the impeached transaction cannot stand because no one is allowed to retain any benefit arising from his own fraud or wrongful act: see *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171.

Before dealing with the circumstances which the plaintiff says establish undue influence in this case, it might be well to refer to those which tend to show how Mr. Shortell felt disposed towards the parties to this action and to still other circumstances which he might well have had in mind at the time he executed the disputed documents in the defendant's favour. In the ordinary course of things one would not think he would have preferred his hired man to his only child.

To begin with, as I have said, the plaintiff left her home on the farm in 1939 and never returned to reside there permanently. After her grandmother died in 1944, and again after her mother died in August 1947, she chose to reside away. The situation then was that her father and the defendant and Mr. O'Neill had to get along without a woman's assistance at a time when, on her own admission, her father's health was failing. Mr. Shortell had remarked to Mr. Webster that his daughter had been away from

the farm for some years and would not come back and that she was earning a good salary. To Mr. Herrington he had indicated that his daughter had not been out to see him very much. Upon this state of facts it seems fair to assume that the old gentleman felt that the plaintiff did not care for life on the farm as much as for life in the city, and that she preferred clerical work to the rather heavy work that a woman is often required to do on a farm. Furthermore, Mr. Shortell must be taken to have understood that upon his wife's death the plaintiff had become entitled to the 20-acre parcel she had inherited from her grandmother, because, as I have said, this parcel was not included in the lands described in the disputed deed. The old gentleman also knew that the plaintiff had inherited her mother's estate, valued at some \$9,000, and he had this in mind as late as March 1948, because the plaintiff said that at that time he asked her how she was getting on in the winding-up of that estate. She swore that she had never told her father about the contents of her mother's will or about what she expected to realize out of her estate. It seems improbable, however, that he had not known of its approximate worth. Again, nowhere in the evidence does it appear that Mr. Shortell desired to cut his daughter off completely. On the contrary, whenever he spoke of making his will, or about what he had done in the defendant's favour, he always made it clear that it was only the farm and its assets which were to go, or had gone, to the defendant. Mr. Shortell owned other property in the form of cash in the bank and securities, and these, one would expect him to know, would pass to his daughter as his sole heir, as they did in fact. These additional assets were valued at several thousand dollars.

On the other hand, the defendant, as I said, had come to the farm when he was but 13 years of age. He had lived there, apparently with all the privileges of a member of the family, for some 20 years. He had never gone away or married in good times or in bad and there is nothing in the evidence to suggest that there was ever the slightest complaint about his work on the farm. Something was said by the plaintiff and by Mrs. Wright, and admitted by the defendant, about several quarrels between the late Mr. Shortell and the defendant, but it could hardly be expected that the two men, associated as closely as they were day after day, would find themselves in accord at all



times about the work on the farm. At all events, the quarrels were of a minor nature and neither man bore any grudge as a result. Neither the plaintiff nor any one of her witnesses testified to there being ill-feeling between the two men, apart from what I have just said about the quarrels; on the contrary, the evidence of many of the witnesses on both sides impressed upon me the fact that they got along very well together. It is also clear upon the evidence that the defendant always accepted as wages whatever the late Michael J. Shortell seems to have felt he could afford to pay him, and that which he actually received, sometimes after long delays, was little enough to the knowledge of his employer. Ex. 22, a letter written in 1936 by the Catholic Emigration Society to the defendant and produced by him upon his cross-examination, partially corroborates his testimony in these respects.

The point about the defendant's conduct which particularly impressed me was his care for the old gentleman after the decease of Mrs. Shortell in 1947, particularly during the early part of January 1948 and throughout the months that followed until the time of Mr. Shortell's death in July. I refuse to believe that this conduct was in the nature of an attempt on the defendant's part to ingratiate himself with the old gentleman instead of what in my opinion it really was, namely, conduct that might be expected from one who acts towards another in the spirit of Christian charity. After all, the defendant, at least since he was 13 years of age, knew no other father, and upon the evidence Mr. Shortell seems to have come to regard him as a son. Like many old people, Mr. Shortell wished to be independent. To Mr. Webster he said that some of his friends had wanted him to sell out and go to live at the House of Providence but he had refused to do so. He must be understood to have realized that but for the defendant he might well have had to act upon the advice of his friends and spend his last days in the House of Providence.

The present case is therefore not one in which undue influence may be inferred when the taker has "no right to demand" (*i.e.*, no natural or moral claim) and the grantor has "no rational motive to give", in the language of Sir W. Grant M.R. in *Purcell v. M'Namara* (1807), 14 Ves. 91 at 115, 33 E.R. 455, and I do not think it necessary to pass upon the defendant's allegation that there was a contract between him and Mr. Shortell to the

effect that if he stayed with the old gentleman and worked the farm that it was to be his when Mr. Shortell required it no longer. I accept the defendant's statement that Mr. Shortell intimated on more than one occasion that the farm was to be his when he was through with it.

To prove undue influence exercised upon Mr. Shortell, counsel for the plaintiff relied upon the feeling he entertained himself when consulted on 6th April, shared later the same day by Mr. Herrington, that the old gentleman was being influenced by either the defendant or Mr. Gordon or by both these men. The two lawyers knew that Mr. Shortell was a widower with but one daughter and they knew of no reason why he should leave his farm to his hired man and not to her. Realizing that he was old and frail, and that he had come to their respective offices in the company of the person who was the intended donee of the farm and its assets and of Mr. Gordon, they were naturally suspicious lest he had been prevailed upon. In the circumstances, they were unquestionably right in refusing to act for Mr. Shortell, but that does not establish that their suspicions were well founded. Whether they were or not is, of course, the question I must decide upon all the evidence. They could not be expected to know, and did not know, the relation between Mr. Shortell and the defendant as the circumstances have now shown it to be; nor did they know that the evidence would disclose that Mr. Shortell may have felt that he had good reason to leave his farm to the defendant rather than to his daughter. What, if anything, Mr. Shortell said to Mr. Gibson does not appear in evidence, but the statement made by Mr. Shortell to Mr. Herrington to the effect that he wished to consult the defendant and Mr. Gordon to see if it would be all right to leave something to his daughter was of no mean significance upon the question of undue influence. However, it must be remembered that according to Mr. Herrington, Mr. Shortell did not intend to do more than leave his farm to the defendant, and that, while this bit of evidence goes to show he wished to consult the defendant and Mr. Gordon about his daughter's claims upon his bounty, there is nothing in the evidence to show that either man ever sought to influence him against his daughter. Either that happened in point of fact or Mr. Shortell acted as a free agent, and in my judgment, in the light of all the circumstances, I would not be justified in conclud-

ing from what Mr. Shortell said to Mr. Herrington that either Mr. Gordon or the defendant had unduly influenced him up to that time or afterwards.

Mr. Gordon testified for the defendant. He swore that he had been at the Shortell farm some few days before 6th April in connection with some transaction about a horse. He was not sure whether Mr. Shortell or the defendant had asked him to drive them to a lawyer's office in Kingston but he said he agreed to do so and did so on 6th April. Mr. Gordon swore that the late Mr. Shortell had "spoken of a will and said that he wanted to fix the place up for the boy". He said that he thought Mr. Shortell was "mentally o.k. that day". Both men wanted to see Dr. Brown first, he said, and he drove them there after they had had lunch and had visited a barber shop. Later he drove them to Mr. Gibson's office and then to the office of Messrs. Herrington and Slater and the next day to see Mr. Webster. He admitted that he had suggested the names of Mr. Gibson, Mr. Herrington and Mr. Webster in turn, but it does not appear that Mr. Shortell had ever consulted a solicitor before, much less that he was accustomed to consulting any particular solicitor. Mr. Gordon said Mr. Shortell and the defendant had indicated that they had been talking things over and had expressed the desire to get things settled. He denied that he had taken "any part in the transaction", and I could find no reason to doubt his word. Nothing appears in evidence to show that Mr. Gordon was interested in the defendant's welfare, and when Mr. Shortell said he wanted him to see Father Casey and ask him to meet them in Kingston, Mr. Gordon conveyed that message to Father Casey. While Father Casey did not meet them there, the fact that Mr. Gordon delivered the message to him suggests that he was interested only in seeing that Mr. Shortell's desires were furthered.

Counsel for the plaintiff also urged the view that I should accept the evidence of the plaintiff that her father had told her that a paper had been drawn up in Kingston, that the defendant and he himself were now sharing profits and expenses, and that after his death the farm was to belong to her. I do so without reservation, but the explanation may well be, as I think it is, that Mr. Shortell did not want her to be dissatisfied and wished to avoid any unpleasantness. Why should he desire to explain



to her his reasons for preferring the defendant to her in the matter of the farm? Similarly, if he was more or less evasive in his conversation with Mrs. McCarney—and it must be remembered that he did not then deny the defendant's assertion that he had the deed of the place—why should he have felt obliged to explain things to her? To many others who were not related to him he had not hesitated to say that the farm belonged to the defendant after he himself was through with it.

I had the benefit of hearing the defendant testify at length. Where a confidential relationship has been established and the onus of proving the righteousness of the transaction is upon the person who seeks to uphold it, the testimony of that person is of considerably less importance than are the circumstances of the case weighing against him; but that, as I have found, is not the case here. In the present case the allegation against the defendant is one of actual fraud and, the onus being upon the plaintiff to prove her assertions, it would be manifestly unfair to pay little attention to his testimony. I have already summarized his explanation and have found as a fact that Mr. Shortell did lead him to believe that he was to get the farm. I have no doubt that the defendant reminded Mr. Shortell of that promise, perhaps on several occasions, but that is not undue influence. I observed the defendant's demeanour closely and I was impressed by his apparent honesty. After making due allowances for his limited learning and for his palpable ignorance of courts and the giving of testimony, I thought, when he stepped from the witness-box, that the general force of his evidence stood unshaken. My opinion as to his honesty is fortified, I feel, by the evidence called on both sides. It is of no little significance, in my opinion, that no witness who appeared before me said, or even suggested, anything to the contrary, and that everything that was said was favourable to him. I am of the definite opinion that he is not a scheming, acquisitive person. If he were, and if Mr. Shortell had been as helpless as the plaintiff seeks to establish, he would not have stopped at merely acquiring the farm and its assets; he would have ended up with everything. I think this is a case such as that spoken of by Lord Eldon in *Harris v. Tremenhoe*

(1808), 15 Ves. 34 at 39, 33 E.R. 668, quoted by Cozens-Hardy M.R. in *In re Coomber*; *Coomber v. Coomber*, [1911] 1 Ch. 723 at 727 as follows:

"I cannot find any decision, authorizing me to say, that the defendant should not have taken these leases, as of the pure gift of his employer. I am quite ready to say, that, if I could find in the answer or the evidence the slightest hint, that the defendant laid before the testator any account of the value of the premises, that was not perfectly accurate, that would induce me to set them aside, whatever the parties intend, upon the general ground, that the principal never would be safe, if the agent could take a gift from him upon a representation, that was not most accurate and precise. There is no evidence of misrepresentation, circumvention, or any thing, improperly leading the testator to make these leases; that they were not the spontaneous fruit of his own generosity; not weighing the value or amount of the consideration, that should have been given, if it had been the subject of barter."

It is true that there was a discussion about the value of the farm between Mr. Shortell and the defendant on one occasion, according to the latter. Mr. Shortell had merely asked the defendant his opinion as to the value of the farm and the defendant said he had put it at about \$6,000 or \$7,000 and that Mr. Shortell had agreed. Mr. Charles E. Ferguson, a real estate agent called by the plaintiff, put the "asking price" at \$8,000 at the date of trial, but admitted that he knew that another valuator had expressed the opinion that \$6,000 or \$7,000 was too high. Upon this evidence there could be no finding that the defendant had misrepresented the value of the farm to Mr. Shortell. At the most, he was merely asked to express his opinion and Mr. Shortell seems to have shared it.

It was also argued on behalf of the plaintiff that the transaction was improvident in that the documents made no provision for their termination in the event that the defendant failed to abide by his covenant to stay on and work the farm and to provide Mr. Shortell with a home for the remainder of his life. But there can be no doubt in the circumstances here but that the

defendant would have agreed to the inclusion of such a provision, because his subsequent actions prove that he intended to abide by his covenant. In any case the absence of a power of revocation is not conclusive, but is to be taken into account as a matter of evidence only, and is of more or less weight according to the circumstances of each case: see *Hall v. Hall* (1873), L.R. 8 Ch. 430; and *Powell v. Powell*, [1900] 1 Ch. 243.

The law is the same where the transaction is entered into without independent, competent advice. It is as immaterial as mere inadequacy of consideration if the parties were on equal terms, as I have found them to be here, and if there is no evidence or insufficient evidence to prove the exercise of undue influence: see *Harrison v. Guest* (1855), 6 DeG. M. & G. 424, 43 E.R. 1298; *Rhodes v. Bate* (1865), L.R. 1 Ch. 252; *Lyon v. Home* (1868), L.R. 6 Eq. 655; and *Morley v. Loughnan*, [1893] 1 Ch. 736.

[His Lordship here discusses the evidence of the solicitor, Webster, who drew the papers, and concludes as follows:]

In the result, I am of the opinion that undue influence has not been proved in this case and that the action must be dismissed, except that the plaintiff is entitled to have it decided in her favour that she is the owner of the 20-acre parcel which she inherited from her grandmother. She is also entitled to mesne profits for the use of those lands from the date of her father's death. If the parties cannot agree, that matter may be referred to the Local Master at Kingston to fix the amount to which the plaintiff is entitled and the costs of the reference.

With regard to the costs of the action, I think the defendant should have promptly admitted the plaintiff's claim to own the 20-acre parcel. He should have done so at the latest following delivery of the statement of claim. For that reason I think he should be deprived of one-quarter of his costs.

Nothing I have said is intended, of course, to affect the plaintiff's right to take from the farm dwelling or the farm premises any chattel property of which she may not now have possession. I gathered that she has already taken what she owns, but if not,



and if there is any dispute about anything of that nature, it may be dealt with in the same reference to the Local Master.

*Judgment accordingly.*

*Solicitor for the plaintiff: Hugh F. Gibson, Kingston.*

*Solicitor for the defendant: William McAdam Nickle, Kingston.*

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[COURT OF APPEAL.]

Re Noble and Wolf.

*Real Property—Restrictive Covenants—Validity—Covenant against Selling to Jews, Negroes, etc.—Certainty—Limitation as to Time—Public Policy—Requisition on Title.*

A deed of land contained a covenant by the vendor that she would observe certain restrictive provisions, which were to remain in force until 1962, and that she would exact the same covenant from any person to whom she sold the lands. The lands in question formed part of a subdivision developed as a summer colony, and the original deeds of all other parcels in the subdivision contained the same covenant. The first five of the restrictions had to do with the buildings to be erected, and the remaining one was to the effect that the lands "shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause".

An agreement was made for the sale of the land, and the purchaser's solicitor made a requisition, "in view of the fact that the purchaser herein might be considered as being of the Jewish race or blood", requiring a release from the restriction and an order declaring that the restrictive covenant was void and of no effect. The vendor's solicitors replied to this requisition that in their opinion the restriction was invalid and the vendor and purchaser were not bound to observe it, under the decision in *Re Drummond Wren*, [1945] O.R. 778. The purchaser's solicitor did not accept this answer, and insisted upon a declaratory order, and the vendor's solicitors then moved, under The Vendors and Purchasers Act, for an order "declaring that the objection . . . has been fully answered by the Vendor, and that the same does not constitute a valid objection to the title".

*Held*, the motion must be dismissed.

The covenant was not invalid as a restriction upon alienation, repugnant to the title conveyed. There was nothing approaching a general restriction upon alienation, and the field of likely purchasers was left largely untouched. *In re Macleay* (1875), L.R. 20 Eq. 186; *In re Rosher*; *Rosher v. Rosher* (1884), 26 Ch. D. 801; *Blackburn et al. v. McCallum* (1903), 33 S.C.R. 65; *Hutt v. Hutt* (1911), 24 O.L.R. 574, applied. (The mere fact that the restriction was limited in time would not have availed to preserve the restriction if it had been general in character). The fact the the restriction was based upon "race or blood" did not affect the position. *O'Sullivan v. Phelan et al.* (1889), 17 O.R. 730; *Commissioner for Local Government Lands and Settlement v. Kaderbhai*, [1931] A.C. 652, referred to.

As to the argument that the covenant was void for uncertainty, it was a covenant rather than a condition involving forfeiture of the estate, and was consequently not to be construed with the same strictness. The words were to be given their usual and ordinary meaning, and it was not fatal to a covenant if some parts of it were not clear, provided the meaning of what remained was clear. *Mann v. Stephens* (1846), 15 Sim. 377, referred to. The covenant could be declared void on this ground only if it was impossible reasonably to give it any meaning, and that was not the case here. (*Clayton et al. v. Ramsden et al.*, [1943] A.C. 320; *Clavering v. Ellison et al.* (1859), 7 H.L. Cas. 707, distinguished; *Pearson v. Adams* (1912), 27 O.L.R. 87; 50 S.C.R. 204, applied, per Hogg J.A.)

Nor could the covenant be declared invalid on grounds of public policy. It was essential to a pleasant summer holiday that the members of

the colony should be congenial, and the purpose of this clause was obviously to assure in some degree that the residents should be of a class that got along well together. If the law sanctioned, as it did, the restricting of the individual's freedom of alienation by limiting it to persons of a particular class, then there was no principle of public policy against which this restriction offended. (Per Hogg J.A.: The established principles of public policy should not be extended by reference to principles and obligations set forth in international covenants or charters, such as the charter of the United Nations, which have not been made part of the law of this country. *Fender v. St. John-Mildmay*, [1938] A.C. 1; *Walkerville Brewing Co. Ltd. v. Mayrand* (1929), 63 O.L.R. 573, applied; other authorities reviewed.) Judgment of SCHROEDER J., [1948] O.R. 579, affirmed.

10th and 11th January 1949. The appeals were heard by ROBERTSON C.J.O. and HENDERSON, HOPE, HOGG and AYLES-WORTH JJ.A.

*J. Shirley Denison, K.C.*, for the purchaser, appellant: A distinction is to be made between the different restrictions in this deed. Those lettered (a) to (e) deal with the user of the land by the purchaser, but (f), with which this appeal is concerned, is in a different category. Looking at the words "shall never be sold", we find that it is not a covenant that one who buys the land shall observe certain conditions, but rather that no one can buy the land if he is within certain classes. It is therefore not a covenant that will run with the land, under the rule in *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143, although the other restrictions do come within that rule. [ROBERTSON C.J.O.: This is a motion under The Vendors and Purchasers Act, R.S.O. 1937, c. 168, and we are concerned only with the validity or otherwise of the purchaser's requisition and the vendor's answer thereto. The appeal is within a very narrow compass. The vendor's reply to the requisition is based upon the decision in *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674, and the question before us is whether that is a sufficient answer. Is not your present argument wholly outside that case?] My client wants the land, but he finds an alleged restriction and cannot get a good title. That is the true issue. If we can show that this is not a true restrictive covenant, running with the land, we can get a good title, which is our object. It does not matter how that result is arrived at. [ROBERTSON C.J.O.: The purchaser says, here is a covenant, and I want it removed from the title, or declared invalid.] The trial judge held that it was not void, the application having been for an order that it was void. The purchaser does not rely on the



*Drummond Wren* case, but also asks for a declaration that the restriction is void. If it is void, the doctrine of *Tulk v. Moxhay*, *supra*, should not be extended further because of public policy. [ROBERTSON C.J.O.: It is anomalous for the two parties to an agreement to bring a matter before the Court in this way.] Surely the practice is usual. The whole question is whether or not this covenant is binding, so as to spoil the purchaser's title. [ROBERTSON C.J.O.: The grantor was a limited company; if the vendor and purchaser agree, then the company could come into court to test the validity of the covenant.] The company is no longer in existence, and both the vendor and the purchaser contend that the covenant is invalid. [ROBERTSON C.J.O.: The Vendors and Purchasers Act was intended for the settlement of differences between vendor and purchaser; when there is no disagreement between them, surely the matter is not within the scope of the Act.] Both want to get rid of this covenant. The vendor says that he has a good title; the purchaser maintains that the covenant is in his way.

In England the Courts would never widen the doctrine to uphold a covenant which was not a burden on the land, but rather a restraint on the capacity of particular races to own the land. In the United States, where negroes exist in large numbers, there are restrictive covenants, although equal rights were given to them by a constitutional amendment. The Supreme Court of the United States has taken the position that while such covenants are valid as between the parties they cannot be enforced: *Shelley et ux. v. Kraemer et ux.*; *McGhee et ux. v. Sipes et al.* (1948), 68 S. Ct. 847. In Ontario there are three cases in point: *Essex Real Estate Co. Ltd. v. Holmes* (1930), 37 O.W.N. 392, affirmed 38 O.W.N. 69; *Re Bryers & Morris* (1931), 40 O.W.N. 572; *Re McDougall and Waddell*, [1945] O.W.N. 272, [1945] 2 D.L.R. 244. All three followed a formula, but did not decide that such covenants were valid.

The doctrine of *Tulk v. Moxhay*, *supra*, has never been extended to cover covenants dealing with ownership rather than user. [ROBERTSON C.J.O.: What about the cases restraining conveyances outside a particular family?] Those are cases of conditions in devises, rather than covenants in deeds. [ROBERTSON C.J.O.: This is a wholly new point, never argued before in this case.] Our position is that while any owner may refuse to sell to a Jew if he wishes, the covenant does not affect a Jew

if the land is in fact sold to him. A personal obligation on a vendor cannot run with the land. I refer to *Rogers v. Hosegood*, [1900] 2 Ch. 388; *The Mayor, etc. of Congleton v. Pattison et al.* (1808), 10 East 130, 103 E.R. 725.

Courts of equity have never gone so far as to say that a person of a particular race can be incapacitated from buying land. [ROBERTSON C.J.O.: The incapacity is in the vendor, not the purchaser.] If the vendor cannot sell to A because of his race, then A's capacity to buy is affected. As to covenants which run with the land, I refer to Behan, *Covenants affecting Land*, 1924, pp. 52, 55.

The Legislature has indicated how people should be treated. One of the earliest statutes dealing with the rights of aliens is "An Act to secure to and confer upon certain inhabitants of this Province, the civil and political rights of natural born British subjects", 1828 (U.C.), c. 21, which puts all classes on the same basis. [AYLESWORTH J.A.: That states a general principle, but does not refer to the right to acquire a particular property.]

*N. Borins, K.C.*, for the purchaser, appellant: The trial judge should not have rejected the argument based on public policy. To give legal sanction to such a covenant as this would itself be to create a new head. Legislative intention has been shown in *The Racial Discrimination Act*, 1944 (Ont.), c. 51, s. 1; *The Insurance Act*, R.S.O. 1937, c. 256, s. 99; *The Community Halls Act*, R.S.O. 1937, c. 284, s. 6. Public policy in Ontario has been against discrimination at least as far back as 1849. It follows that such covenants are against public policy and therefore void. [AYLESWORTH J.A.: It might be argued that the Legislature, by dealing specifically with the matters you have referred to, had left other contractual matters at large.] The Court is not limited to matters expressly dealt with by the Legislature. [ROBERTSON C.J.O.: The Court cannot create public policy; it can only declare it.] This country has entered into treaties containing provisions as to discrimination against racial and national minorities, and these are evidence of the public policy of Canada. [ROBERTSON C.J.O.: The sale of land is not a matter within the legislative competence of the Dominion.] It may be that legislation on the subject would have to be passed by the Province, but the treaties are indicia of the public policy of the whole Dominion.] [ROBERTSON C.J.O.: That might involve the

abolition of such groups as the St. Andrew's Society and the St. George's Society.] That is a very different matter from a covenant based on racial discrimination. [ROBERTSON C.J.O.: What do you say of a summer colony limited to university people?] It is a very different thing to be told that you cannot become a member of a community strictly confined to university people, on the one hand, and to be told, on the other, that you cannot buy a particular piece of property because of your race. I refer to 7 Halsbury, 2nd ed. 1932, pp. 153-4. Such covenants set up divisions and hatreds within the community which are not for the good of the community at large: *Bourne et al. v. Keane et al.*, [1919] A.C. 815.

*J. R. Cartwright, K.C.* (P. A. H. Hess, with him), for the vendor, appellant: Vendor and purchaser were at one in their contentions in *Re Toronto General Trusts Corporation and Crowley*, 62 O.L.R. 593 at 597, [1928] 4 D.L.R. 609. This motion is not merely academic, since the material indicates that if the sale is completed an injunction will be applied for.

In our submission *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674, was rightly decided, and should have been followed in this case. It was followed by Barlow J. in an unreported judgment delivered 12th June 1946. *Commissioner for Local Government Lands and Settlement v. Kaderbhai*, [1931] A.C. 652, throws no light on the situation here. As to public policy, I refer also to *Re Millar*, [1936] O.R. 554 at 559, [1937] 1 D.L.R. 127, affirmed [1937] O.R. 382, [1937] 3 D.L.R. 234; [1938] S.C.R. 1, [1938] 1 D.L.R. 65. Mackay J. came to the conclusion, in the *Drummond Wren* case, that such a covenant as this is against the public good, and hence contrary to public policy. [ROBERTSON C.J.O.: Did he consider the various judicial warnings against extending the heads of public policy?] Yes, at p. 783. He was right to take into consideration treaties and utterances of public men, in the absence of more concrete evidence. The first assembly of the World Council of Churches, in 1948, denounced racial discrimination. In considering what is public policy, the Court is not restricted to considering Provincial legislation, merely because the matter in question falls within the legislative competence of the Province. The real test is whether this covenant, if upheld and perpetuated, will tend against the public good. If it is valid, it means that a particular religious group may be perpetually excluded. [HENDERSON J.A.:



Surely it is a matter of public policy that the Court should not interfere with the freedom of contract.] Every time the doctrine of public policy is invoked it affects contractual rights. [AYLESWORTH J.A.: The Legislature has made some provisions in such matters in The Racial Discrimination Act, 1944 (Ont.), c. 51, but that statute does not refer to covenants. You are asking the Court to decide that there is a public policy in a matter that the Legislature has left alone.] The Court is always dealing, in such cases, with something that the legislature has not dealt with. As to public policy generally, I refer to 7 Halsbury, 2nd ed. 1932, pp. 153-4. The question is one of law: *ibid.*, p. 147, para. 209; *In the Estate of Hall; Hall v. Knight et al.*, [1914] P. 1 at 5; *Naylor, Benzon & Co., Limited v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331 at 343-4; *Hurd et al. v. Hodge et al.*; *Urciolo et al. v. Hodge et al.* (1948), 68 S. Ct. 847; *Shelley et ux. v. Kraemer et ux.*; *McGhee et ux. v. Sipes et al.* (1948), 68 S. Ct. 836. [ROBERTSON C.J.O.: As I understand the American decisions, they were to the effect that such a covenant was valid, but that it could not be enforced because of the 14th amendment to the Constitution. We have nothing corresponding to the 14th amendment. Here we have a community formed by a group of persons who are congenial, and who join to ensure that it shall remain congenial for 29 years. What is wrong about that?] The wrong lies in attempting to restrict the ownership of particular land by excluding one group. [AYLESWORTH J.A.: What about the Indian reservations?] That is a special case, covered by statute. People may of course form a club, but there prospective members are considered as individuals; here a group, because of race, is peremptorily excluded.

This covenant is also void for uncertainty. It does not define what percentage of Jewish blood is necessary to bring the exclusion into existence. It is impossible to say what test can be applied by the Court: *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320, [1943] 1 All E.R. 16. In the case of a deed, the Court would probably declare such a condition severable: 10 Halsbury, 2nd ed. 1933, p. 282, para. 351; *Murray et al. v. Dunn et al.*, [1907] A.C. 283. [ROBERTSON C.J.O.: What about the concluding words, limiting it to "persons of the white or Caucasian race not excluded by this clause"?] That has no bearing on the question, in my submission.

The covenant is also void as a restraint on alienation. There are cases which say that a partial restraint is good, but none that are binding on this Court. A complete restraint would undoubtedly be bad. The law on this question is in a somewhat unsatisfactory state. I refer to *In re Rosher*; *Rosher v. Rosher* (1884), 26 Ch. D. 801; In Preston and Newsom on Restrictive Covenants, 1939, the authors doubt some of the earlier cases, such as *In re Macleay* (1875), L.R. 20 Eq. 186, which they find impossible to reconcile with *Attwater v. Attwater* (1853), 18 Beav. 330 at 337, 52 E.R. 131. *Blackburn et al. v. McCallum* (1903), 33 S.C.R. 65, cannot be taken to be an adoption into our law of *In re Macleay*. [ROBERTSON C.J.O.: Although some of the earlier decisions may be open to criticism, they have been followed for so long in this Province that we cannot depart from them.] I ask the Court at least to say that the right to impose a partial restraint must not be extended beyond the decided cases; a restraint such as the present, excluding particular classes in the community, would be such an extension. There is a distinction between the type of restriction which seeks to keep property in a family and the kind of restriction we have here. [AYLESWORTH J.A.: In *O'Sullivan v. Phelan et al.* (1889), 17 O.R. 730, the restriction practically excluded everybody except one person.] *Doe d. Gill v. Pearson* (1805), 6 East 173, 102 E.R. 1253, shows that the rule may be relaxed to permit the keeping of property within a family. But if the restriction is not of that kind it is a different matter: 15 Halsbury, 2nd ed. 1934, p. 729.

The trial judge was wrong in rejecting this argument because the restriction was limited in time. A condition otherwise invalid will not be saved by being limited in time: *In re Rosher*, *supra*; *Blackburn et al. v. McCallum*, *supra*.

This covenant is directly contrary to s. 1 of The Racial Discrimination Act. Registration of the covenant is a publication to the world. I ask the Court in this respect to overrule the decision in *Re McDougall and Waddell*, [1945] O.W.N. 272, [1945] 2 D.L.R. 244.

K. G. Morden, K.C., for other owners, respondents: Mrs. Noble did not sign this deed, but she accepted it and paid the purchase price, and the covenant is therefore binding upon her: *Re Wheeler*, 59 O.L.R. 223, [1926] 4 D.L.R. 392; *Re Rowan and Eaton*, 59 O.L.R. 379, [1926] 4 D.L.R. 582, affirmed 60 O.L.R.

245, [1927] 2 D.L.R. 722. It comes within the doctrine of *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143, and is enforceable by us because we have the benefit: *McAleer et al. v. Desjardine et al.*, [1948] O.R. 557 at 562, [1948] 4 D.L.R. 40. If this covenant is not upheld, the value of our property will depreciate. Mrs. Noble purchased with knowledge of the covenants, and has enjoyed the benefit of them for 15 years; now that she is leaving she raises, for the first time, the question of validity: *The Exchange Bank of Yarmouth v. Blethen* (1885), 10 App. Cas. 293, C.R. [9] A.C. 113. [ROBERTSON C.J.O.: It is true that she had the benefit, and she derived it from her vendor, but that vendor has not sought to enforce the covenant. The other owners are not assignees.] The clause as to user constitutes part of a building scheme, and everyone gets the benefit and bears the burden. By analogy to the practice under s. 60 of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, the Court should not declare the covenant invalid if such a declaration would injure others.

A great deal of law as to public policy has been established by the Courts, but the modern tendency is to leave the question to the legislature: 7 Halsbury, 2nd ed. 1932, p. 154; *Mogul Steamship Company, Limited v. McGregor, Gow & Co. et al.*, [1892] A.C. 25; *Re Millar, supra*; *Egerton v. Earl Brownlow et al.* (1853), 4 H.L. Cas. 1 at 106, 10 E.R. 359; *Fender v. St. John-Mildmay*, [1938] A.C. 1, [1937] 3 All E.R. 402. Public policy must depend upon public opinion as it exists from time to time, and while this can be acted upon by the legislature, it cannot be applied by the Courts. The purchaser here, not being a party to the agreement, has no right to attack it on grounds of public policy: 2 C.E.D. (Ont.), p. 877.

It is clear that The Racial Discrimination Act, 1944 (Ont.), c. 51, cannot extend to the registration of documents. If it did, who could be said to commit an offence? If the document is in the registry office, and is within the Act, then there is a continuing offence. All the statutes cited for the appellants in this connection deal with particular situations and nothing more; not one of them affects contracts. Since the Legislature of this Province has entered the field, and remained silent as to contracts, that indicates that it has no public policy with respect to them, and the Courts cannot extend the field.



The American decisions are, if anything, helpful to my contention. Such covenants have been upheld in many cases: *Corrigan et al. v. Buckley* (1926), 271 U.S. 323; *Corpus Juris Secundum*, vol. 16, 1939, p. 1095; vol. 21, 1940, 902; 61 *Harvard Law Review*, 1948, p. 1450.

The charter of the United Nations and the peace treaties are not part of the law of Canada, and their only effect is that nations must behave in conformity with them. The pronouncements of religious bodies cannot affect title to land in Ontario.

This covenant is in effect no more discriminatory than one that requires that a house built on a particular parcel shall be of a prescribed minimum value.

Public policy requires the upholding of contracts, and there is also a public interest in the ability to choose one's associates: *Christie v. The York Corporation*, [1940] S.C.R. 139 at 143, [1940] 1 D.L.R. 81. It is a source of strength to the community that there should be a variety of groups, each making a contribution to the whole; otherwise there is complete regimentation. This is a summer resort property and the owners must necessarily be more intimate than would be the case in a city. It is more like a club. There are large tracts of land in Ontario still available for summer resort purposes.

As to the restraint upon alienation, I refer to Cheshire, *The Modern Law of Real Property*, 5th ed. 1944, p. 528. A partial restraint is valid: *Blackburn et al. v. McCallum* (1903), 33 S.C.R. 65 at 78; *Re Hazell*, 57 O.L.R. 290 at 294, [1925] 3 D.L.R. 661. A covenant of this kind is different from a condition, giving rise to a right of re-entry in case of breach: *Armour on Real Property*, 2nd ed. 1916, p. 163. *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320, [1943] 1 All E.R. 16, was a case of a condition subsequent in a will. If the covenant was valid there might be a forfeiture, but otherwise there would be a vested estate. The case has no application here. A will is a unilateral act, but here there is evidence of mutual intention: *Pearson v. Adams* (1912), 27 O.L.R. 87, 7 D.L.R. 139, reversed 28 O.L.R. 154, 12 D.L.R. 227, but restored 50 S.C.R. 204. If a particular person is thought by us to belong to a prohibited class, then the onus is on us, if we seek to enforce the covenant, to prove that he does so belong.

The law does recognize a Jewish race: *The Statistics Act*, R.S.C. 1927, c. 190, s. 19.

The issue here is purely academic: *Re Lockyer*, [1934] O.R. 22, [1934] 1 D.L.R. 687; *Re Williams*, [1947] O.R. 11, [1947] 1 D.L.R. 882.

*J. Shirley Denison, K.C.*, in reply: It is true that a breach of this covenant gives no right of re-entry. The remedy would doubtless be damages or an injunction. There is a distinction between purchase and user, but here both are dealt with in a single covenant, which attempts to prohibit both sale and user. The doctrine in *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143, never had to do with alienation. A Jew might buy this land and never go near it, and this would nevertheless constitute a breach of the covenant. It is offensive and arrogant. The Court has a right to decide whether racial restrictions are valid: *Rogers v. Hosegood*, [1900] 2 Ch. 388.

*J. R. Cartwright, K.C.*, in reply: The judgment in *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674, attained very wide publicity, and there was no legislative disapproval. This may be some indication of public policy.

*Cur adv. vult.*

9th June 1949. ROBERTSON C.J.O.:—These are appeals by both the vendor and the purchaser from the order made by Mr. Justice Schroeder on the 11th June 1948, upon an originating motion under The Vendors and Purchasers Act, R.S.O. 1937, c. 168.

The vendor, by deed dated 15th January 1933 and duly registered in the proper registry office, became the owner in fee simple of part of Lot 6, Lake Road, West Concession, in the township of Bosanquet, in the county of Lambton. The grantor in this conveyance was the Frank S. Salter Company Limited, a company incorporated under the laws of the Province of Ontario, and having its head office at the city of Windsor, in the county of Essex. This company had subdivided a larger tract of land into parcels, intended for residential purposes, and disposed of these parcels to some 35 different owners. The record before us does not contain much in the way of particulars of the size of the several parcels. The vendor's parcel in question here is some 70 feet by 382 feet. The lands border on the shore of Lake Huron, and have been built upon and have become an attractive place for summer residences. The owners have formed

among themselves an association known as "The Beach O'Pines Protective Association", to safeguard their interests.

Each of the conveyances made by the Salter company contains a restrictive covenant, beginning as follows:

"AND the Grantee for himself, his heirs, executors, administrators and assigns, covenants and agrees with the Grantor that he will carry out, comply with and observe, with the intent that they shall run with the lands and shall be binding upon himself, his heirs, executors, administrators and assigns, and shall be for the benefit of and enforceable by the Grantor and/or any other person or persons seized or possessed of any part or parts of the lands included in Beach O'Pines Development, the restrictions herein following, which said restrictions shall remain in full force and effect until the first day of August, 1962, and the Grantee for himself, his heirs, executors, administrators and assigns further covenants and agrees with the Grantor that he will exact the same covenants with respect to the said restrictions from any and all persons to whom he may in any manner whatsoever dispose of the said lands."

There follow six sub-clauses lettered (a), (b), (c), (d), (e) and (f). The first five sub-clauses contain restrictive provisions as to the use of the lands and premises conveyed by the deed, and the character and location of the dwelling-house to be erected upon them. Sub-clause (f) is as follows:

"(f) The lands and premises herein described shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause."

The matters with which we are concerned on this appeal arise in respect of sub-clause (f).

By an agreement in writing dated 19th April 1948 the purchaser, Bernard Wolf, agreed to buy from the vendor, Annie Maud Noble, her premises situate on the Beach of Pines known as the "Noble Cottage", and being the lands that the vendor had purchased from the Salter company, as already stated. In



the course of carrying out this purchase and sale the solicitor for the purchaser made the following requisition upon the vendor's solicitors in respect of title:

"REQUIRED, in view of the fact that the purchaser herein might be considered as being of the Jewish race or blood, we require a release from the restrictions imposed in the said clause (f) and an order declaring that the restrictive covenant set out in the said clause (f) is void and of no effect."

This requisition was answered by the vendor's solicitors in a letter of 6th May 1948, in which they said:

"In our opinion the decision rendered in the case of *re Drummond Wren*, 1945 Ontario Reports at 778 applies to the facts of the present sale, with the result that the clause (f) objected to is invalid and the vendor and purchaser are not bound to observe it."

The purchaser's solicitor insisting upon his requisition for a declaratory order, on the 11th May 1948 the vendor initiated this proceeding by notice that an application would be made before a judge for an order "declaring that the objection to the restrictive covenant made in writing on behalf of the purchaser dated 5th May, 1948, has been fully answered by the vendor and that the same does not constitute a valid objection to the title".

This motion was argued before Schroeder J., and on the 11th June 1948 he made an order declaring that the restrictive covenant contained in clause (f) of the deed from the Salter company to the vendor, dated 15th June 1933, "is a valid and enforceable covenant and that the Vendor has not satisfactorily answered the Purchaser's objection thereto". From this order an appeal is taken by both vendor and purchaser. The grounds of appeal stated are the same in both notices of appeal and are the following:

"1. That the said clause in the restrictive covenant in question is illegal, void and unenforceable, being contrary to public policy.

"2. That the said clause is void and unenforceable for uncertainty.

"3. That the said clause is an illegal and void restraint upon the freedom of alienation of the lands thereby affected.

"4. That the said clause is void and unenforceable as a restraint upon the alienation, occupancy and user of land because

of race or blood, such being a novel restraint unknown to and unrecognized by the common law.”

When the appeals came on for argument attention was called to the first paragraph of the order of Mr. Justice Schroeder, by which it was ordered that certain of the other owners of parcels of land in the Beach O’Pines Development do represent, for the purpose of these proceedings, all other persons entitled to enforce the restrictive covenants affecting the lands in the Beach O’Pines Development, and it was suggested that in view of Rule 602 of the Rules of Practice of the Court, this direction for representation was not authorized. Counsel for the appellants thereupon requested an adjournment of the motion in order that notice might be served upon all the owners. The motion came on again to be heard on 10th January 1949, when most of the owners, but not all, were represented by counsel.

The application before Mr. Justice Schroeder being for an order declaring that the objection to the restrictive covenant made in writing on behalf of the purchaser had been fully answered by the vendor, and that it did not constitute a valid objection to the title, and that answer being that the decision rendered in the case of *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674, applies to the facts of the present case, with the result that the clause (f) objected to is invalid, and the vendor and purchaser are not bound to observe it, it is necessary to see what was decided in the case of *Re Drummond Wren*. That was the case of an application by the owner of certain lands to have declared invalid a restrictive covenant assumed by him when he purchased the lands in question, and which he agreed to exact from his assigns. The restrictive covenant was in the following words, “Land not to be sold to Jews or persons of objectionable nationality”. The application was made under s. 60 of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, and Rules 603 and 604 of the Rules of Practice. No one appeared to oppose the application, but the Canadian Jewish Congress was represented by counsel. Counsel for the applicant put forward, in support of his application — first, that the covenant was void as against public policy; secondly, that it was invalid as a restraint on alienation; thirdly, that it was void for uncertainty; and fourthly, that it contravened the provisions of The Racial Discrimination Act, 1944 (Ont.),

c. 51. The application came before Mr. Justice Mackay, who made an order declaring that the restrictive covenant attacked was void and of no effect. In his reasons for judgment he stated his opinion that the covenant was void on the first three grounds taken by the applicant, as above stated. He did not deem it necessary to decide upon the fourth ground.

The facts upon which the judgment in the *Drummond Wren* case is based differ somewhat from the facts in the present case. In the *Drummond Wren* case the terms in which the restrictive covenant was stated were not the same and there was no limitation as to time, as there is in the present case. So far as appears from the reasons for judgment of the learned judge who decided the case of *Re Drummond Wren*, there was nothing before him to indicate any special use for which the land in question was designed when the restriction was imposed, nor whether there were other lands intended to be benefited by the restriction, as in the present case. Counsel for the appellants did not always confine their submissions, in attacking the covenant now in question, to grounds that were decided by Mr. Justice Mackay in the *Drummond Wren* case. Attention was called by the Court to the nature of the proceeding before us, and to the limited scope of the answer made to the purchaser's objection to title, and no leave was given—even if any such leave could be given—to add anything to the vendor's answer to the purchaser's requisition on title. There are obvious difficulties in the way of applying what was decided in the *Drummond Wren* case to the facts of this case, and there is further difficulty in deciding this case in appellants' favour on grounds that were not taken in the earlier case.

Coming then to the four grounds set forth in the notices of appeal, I shall deal first with the objection that the restrictive covenant in question is an illegal and void restraint upon the freedom of alienation. It is submitted that the owner of property, as an incident of his ownership, has an unrestricted right to sell it, and that the covenant here in question is repugnant to the title in fee simple vested in the present vendor by her deed. The history of the decisions in this Province upon that question is somewhat intricate, and in England there have been differences of judicial opinion. For the purposes of the case in hand I need not go further back than the decision of Sir George Jessel M.R. in the case of *In re Macleay* (1875), L.R. 20 Eq. 186. In that



case land was devised by the testatrix to her brother "on the condition that he never sells it out of the family". After a review of some older authorities the judgment proceeds:

"Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore, it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. . . . Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule."

In the result the decision was that, this being a limited restriction upon alienation, the condition was good.

This decision *In re Macleay* was commented upon in the case of *In re Rosher*; *Rosher v. Rosher* (1884), 26 Ch. D. 801, a decision of Pearson J. While the condition in restraint of alienation annexed to a devise in fee in that case was substantially different from the condition in the earlier case, and the actual decision in that respect was only that an absolute prohibition to sell at all during a fixed period was not saved by the limitation as to time, Mr. Justice Pearson, in a very able judgment, discussed broadly the question of restraints upon alienation, and expressed an opinion upon the broad question that differed radically from that expressed by Sir George Jessel. It is not necessary to pursue further the course of the decisions in England, for in Ontario, at least since the decision in the *Macleay* case, the decisions have a history of their own. In this Province, in numerous cases, the decision in the case of *In re Macleay* was followed, until finally the question reached the Supreme Court of Canada in the year 1902. I do not propose to cite the numerous reported decisions in this Province during that period, but will, for convenience of

reference, cite Mr. E. Douglas Armour's well-known Treatise on the Law of Real Property, 2nd ed. 1916, pp. 168-171.

Mr. Armour refers, in a footnote, to an article by the late A. H. Marsh, Q.C., in 17 Canada Law Times at pp. 105 and 136. At pp. 106-7 Mr. Marsh gives a list of the reported decisions on the question in this Province up to 1897, when his article was published. One of the most important of the decisions is that of the Court of Appeal in *Earls v. McAlpine* (1881), 6 O.A.R. 145. Mr. Marsh, who was a very able lawyer and an authority on matters of real property law, clearly preferred the reasoning of Pearson J. in *In re Rosher* to that of Sir George Jessel in *In re Macleay*, but expressed the view that *In re Macleay* had been so long and so consistently followed in this Province that it had become established as stating the law binding upon the Courts of the Province.

The question came before the Supreme Court of Canada in 1902 in *Blackburn et al. v. McCallum* (1903), 33 S.C.R. 65. The opinion of Davies J. (afterwards C.J.C.), in which Sedgewick J. concurred, has been regarded as the prevailing judgment. Mr. Justice Davies, after stating that the general rule, avoiding conditions which prohibit the grantee in fee from alienating his land, is to be found clearly laid down in all the earlier books of authority, and is founded upon principles about which there can be no doubt, and which are easily intelligible, proceeds to say that there can be equally little doubt that upon this general rule there have been grafted several exceptions. He cites the cases of *Doe d. Gill v. Pearson* (1805), 6 East 173, 102 E.R. 1253, and *In re Macleay, supra*, as establishing the existence of exceptions to the general rule which it was not necessary to call in question. He says that all the leading text-writers upon real property law cite these cases with approval, and, in his opinion, it is too late in the day now for us to call them in question. Later, at p. 81, in referring to the same two decisions, he says: ". . . while they support the contention that a restriction upon alienation limited to a specified class only may be good, [they] do not support the proposition we are asked to indorse that a general restriction upon alienation which, if unrestricted as to time would be admittedly bad, is made good by a time limitation."

It would appear that the judges of the Supreme Court must have considered as unnecessary to the decision in the *Macleay* case the dictum of Sir George Jessel in that case, in regard to the effect of a limitation as to time in preserving a restriction upon alienation that would otherwise be held invalid as too general. Plainly, they did not intend to dissent from the decision in the *Macleay* case that the restriction there in question was valid as a restriction limiting alienation to a particular class. Mr. Justice Davies cites the *Macleay* case as authority for maintaining the validity of a restriction so limited.

This decision of the Supreme Court of Canada was discussed in the Court of Appeal in *Hutt v. Hutt* (1911), 24 O.L.R. 574. I refer particularly to the judgment of Moss C.J.O., who deals at some length with the judgment of the Supreme Court of Canada in *Blackburn v. McCallum*. His judgment was concurred in by Garrow and Maclaren JJ.A. The will in question in *Hutt v. Hutt* is referred to by the Chief Justice at p. 580 as follows: "The effect of the provisions of the will is to impose upon the devisee a condition which, in substance, prevented him from selling the land to any one but the plaintiff during his lifetime, or disposing of it by will to any one unless he survived the plaintiff. In other words, it was, having regard to the evidence as to the actual value of the farm, an absolute restraint against disposal during the plaintiff's lifetime." Referring to the result of the decision of the Supreme Court of Canada in *Blackburn v. McCallum*, Chief Justice Moss said: "In view of the opinions expressed and the decision actually rendered, it must be taken that, to the extent to which *Earls v. McAlpine* determined that a restriction upon alienation limited to the lifetime of a third person is a condition valid at law, it must be deemed to be no longer a binding authority, and that the decision in *Blackburn v. McCallum* is to be accepted as determining the contrary."

The Court of Appeal, in *Hutt v. Hutt*, said nothing to indicate that they considered the judgment of the Supreme Court in *Blackburn v. McCallum* to cast doubt on the authority of *In re Macleay*, except to the extent that that case was cited as authority for the proposition that a limitation as to time only is sufficient to preserve a restriction upon alienation otherwise invalid, as a general restriction. Mr. Justice Meredith says at p. 585: ". . . it is quite too broad an assertion to say that all that was



said by Pearson, J. in the case of *In re Rosher* has the endorsement of the Supreme Court of Canada, in the case of *Blackburn v. McCallum*." Mr. Justice Magee said at p. 590: "Nor do I think that *Blackburn v. McCallum* . . . can be taken as deciding more than that a restraint upon alienation unlimited except as to time is invalid."

Since these decisions in *Blackburn v. McCallum*, *supra*, and *Hutt v. Hutt*, *supra*, I do not find any reported cases in Ontario that deal with the point in question here. There are cases such as *Paul v. Paul* (1921), 50 O.L.R. 211, 64 D.L.R. 269, and *Rutherford v. Rispin*, 59 O.L.R. 506, [1926] 4 D.L.R. 822, in which a restriction upon alienation otherwise invalid was held not to be made valid by a limitation as to time, and *Blackburn v. McCallum* and *Hutt v. Hutt* were applied.

Applying the principles that must be taken to be established in this Province as the result of the cases to which I have referred, it must be held that the restriction upon alienation in the present case is not invalid as repugnant to the title conveyed. There is no general restriction upon alienation. The field of likely purchasers is left largely untouched. There is nothing in any way approaching a general restriction upon alienation. The limitation of the time for which the restrictions are imposed would not, in itself, avail to preserve a restriction general in character, but there is no such restriction.

Counsel for the appellants addressed argument to the Court as to the effect of the covenant in question upon a purchaser from the present vendor who had completed his purchase and had received a conveyance. It was submitted that the title of such a purchaser or his right to convey would not be affected by the covenant, as the covenant did not run with the land.

We are not, I think, concerned with any question of that kind in this case. In the first place, no such question was decided, or even raised, in the *Drummond Wren* case. In the second place, the question here is as to the validity of the covenant, and that is a question raised upon the facts presently existing. The vendor, Mrs. Noble, is the only person as to whom the question is raised here, that she is not bound because the covenant is void as against her. I, therefore, do not enter upon the consideration of this submission.

It is convenient to deal next with the fourth ground of appeal, that clause (f) of the covenant "is void and unenforceable as a restraint upon the alienation, occupancy and user of land because of race or blood, such being a novel restraint unknown to and unrecognized by the common law". I cannot find anything in the judgment in the *Drummond Wren* case deciding anything of the kind. There are numerous cases where alienation has been restricted to a member or members of the testator's or grantor's family. This is a restriction "because of race or blood" and excludes many more of the world's population than the covenant in this case. *In re Macleay, supra*, and *O'Sullivan v. Phelan et al.* (1889), 17 O.R. 730, are instances of such cases and there are others. In *Commissioner for Local Government Lands and Settlement v. Kaderbhai*, [1931] A.C. 652, the question was whether the Commissioner of Lands, in selling town plots by auction, could impose either or both the conditions, (1) that Europeans only should bid or purchase; (2) that the purchaser should not permit a dwelling-house or outbuildings which were to be erected, to be used as a place of residence for any Asiatic or African who was not a domestic servant employed by him. Lord Atkin said: "If any restriction be allowed the question whether the restriction should be based on racial distinctions is obviously not one of law, but of policy."

Then, it is said that the covenant is void and unenforceable because of uncertainty. Mr. Justice Schroeder has discussed this point at length, and has referred to the recent cases. I shall make only some brief observations. We are dealing here with a covenant, not with a condition. An injunction or damages are the remedies for a breach of this covenant, and not forfeiture of the estate, as if it were a condition, and the same strictness is not to be applied in interpretation. The Court is to give the words used their usual and ordinary meaning and not a technical one. Further, it is not fatal to a covenant that some part or parts of it are not clear, if the meaning of what remains is clear. The Court will determine, when a breach of the covenant is charged, whether or not any one of its restrictions has been broken. The Court may grant an injunction or damages in respect of conduct that amounts to a breach of any restriction clearly imposed, notwithstanding that some of the restrictions in the covenant are too vaguely expressed. In *Mann v.*

*Stephens* (1846), 15 Sim. 377, 60 E.R. 665, the covenant was against erecting any building except one private house or ornamental cottage to be erected in the Dell, and so as to be an ornament, rather than otherwise, to the surrounding property. The Court held that the words relating to the ornamental character of the building were too vague and meaningless to be inserted in the order, but granted an injunction against building otherwise contrary to the covenant.

The question to be determined on this appeal is not whether a certain person, either the purchaser or any other identified individual, is such a person as comes within the description contained in the restrictive covenant. That question might be raised on a motion to restrain a threatened breach of the covenant, but the submission of the appellants on this motion is that the restrictive covenant is so uncertain in its meaning that it must be regarded as unintelligible and, therefore, void. If some of the words of description are ambiguous but others are not, then such meaning, at least, as the unambiguous words will reasonably bear, should be given to them and the covenant should be interpreted accordingly. The covenant should be declared void only if it is impossible reasonably to give it any meaning. I concur in Mr. Justice Schroeder's judgment on this point.

There remains to be dealt with the ground of appeal that clause (f) of the covenant in question is contrary to public policy and therefore void. It is in evidence that the Beach O'Pines Development was undertaken, and is organized, as a place where the owners of the several parcels of land comprised in the development may establish summer homes at a place suitable for such purpose, on the eastern shore of Lake Huron, remote from any large communities. It is common knowledge that, in the life usually led at such places, there is much intermingling, in an informal and social way, of the residents and their guests, especially at the beach. That the summer colony should be congenial is of the essence of a pleasant holiday in such circumstances. The purpose of clause (f) here in question is obviously to assure, in some degree, that the residents are of a class who will get along well together. To magnify this innocent and modest effort to establish and maintain a place suitable for a pleasant summer residence into an enterprise that offends against some public policy, requires a stronger imagination than



I possess. I suppose that if, instead of saying somewhat bluntly that persons of certain race or blood are excluded, the covenant had said that only persons of specified race or blood should be admitted, nothing would have been said about public policy. There is nothing criminal or immoral involved; the public interest is in no way concerned. These people have simply agreed among themselves upon a matter of their own personal concern that affects property of their own in which no one else has an interest. If the law sanctions the restricting by covenant or condition of their individual freedom of alienation of that property by limiting their right of alienation to persons of a particular class, as I think it does, then I know of no principle of public policy against which this is an offence.

Doubtless, mutual goodwill and esteem among the people of the numerous races that inhabit Canada is greatly to be desired, and the same goodwill and esteem should extend abroad, but what is so desirable is not a mere show of goodwill or a pretended esteem, such as might be assumed to comply with a law made to enforce it. To be worth anything, either at home or abroad, there is required the goodwill and esteem of a free people, who genuinely feel, and sincerely act upon, the sentiments they express. A wise appreciation of the impotence of laws in the development of such genuine sentiments, rather than mere formal observances, no doubt restrains our legislators from enacting, and should restrain our Courts from propounding, rules of law to enforce what can only be of natural growth, if it is to be of any value to anyone.

I would dismiss the appeals with costs.

HENDERSON J.A. [after stating the facts]:—In my opinion the reasons for judgment of the learned trial judge are sound and should be followed.

I am of opinion that the judgment in *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674, is wrong in law and should not be followed.

I do not know that we have, in Ontario, a public policy concerning this matter. I do know that in thousands of ways there exist restrictions which have always existed, and always will continue to exist, by which people are enabled to exercise a choice with respect to their friends and neighbours, and I can think of no reason why a group of people who have adopted a

manner of living during two or three months of the year as a summer colony, and who have by agreement among them placed restrictions upon those who may become owners of that colony, are infringing the rights of anybody. Moreover, in my opinion, Mrs. Noble is bound by her covenant entered into knowingly and willingly, and of which she has had the benefit for a period of 15 years, and in my opinion this Court should not lend itself to enable a breach of it. The sanctity of contract is a matter of public policy which we should strive to maintain.

With regard to the argument that the covenant is bad for uncertainty, in my opinion a common-sense reading of the covenant makes its interpretation certain and unquestionable. I am unable to understand why we should enter into refinements as to the percentage of blood which constitutes any person a member of the Jewish, Hebrew, Semitic, negro or coloured race or blood. Mr. Cartwright, in his able argument, agreed that in his opinion the ingenuity of man is not equal to framing a covenant of this kind which would be certain.

Mr. Morden, in reply, referred to The Statistics Act, R.S.C. 1927, c. 190, s. 19, and to The Canadian Census, para. 19.

It is common knowledge that the people who inhabit Canada are divided into races or are described as members of one or other particular race, and it has never occurred to anyone to suggest that in compiling the census or the Canadian statistics of inhabitants it would be necessary to inquire into what percentage of the blood of any race any particular individual has in his veins. "A person of Jewish blood" is a phrase thoroughly understood, and it has never occurred, I think, to anyone to ask what percentage of blood is necessary to constitute an individual "a person of Jewish blood", and the same applies to any other race. Since no authority exists which has declared what is the public policy of Ontario or of Canada upon this subject, it is a rather large order to ask this Court to declare what the public policy is. As I have said, in my opinion in so far as the case of *Re Drummond Wren* so declared it is not good law.

In the course of argument counsel travelled very far afield, and a great many authorities were cited which I do not find it useful to collect.

I am of opinion that the appeals should be dismissed with costs.

HOPE J.A.:—It is unnecessary for me to refer to the facts or to the points of law which arise in this appeal. The former were very fully set out in the judgment of Schroeder J., with whose review and conclusion of the law I concur.

The points of law so ably argued by Mr. Cartwright, K.C., and Mr. Denison, K.C., on the appeal, are amply set out in the reasons for judgment of my Lord the Chief Justice, which I have had the privilege of reading, as I have similarly read the reasons of my brothers Henderson and Hogg. For the purpose of disposing of this appeal, it will suffice for me to say that I agree fully with my Lord the Chief Justice, and with the conclusion reached by my brothers.

However, in view of the reliance placed by the parties hereto on the decision in *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674, I wish to add that, in my opinion, freedom of the individual in and under a democracy has implicit in it, as an absolute, the freedom of association. In my reasons for judgment in *Rex v. Container Materials Ltd. et al.*, 74 C.C.C. 113 at 117, [1940] 4 D.L.R. 296, varied 76 C.C.C. 18, [1941] 3 D.L.R. 145, which was affirmed *sub nom. Container Materials, Limited et al. v. The King*, [1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529, I used this expression: "Paradoxical as it may appear at first sight, it is clear that the power of combination is based upon individualistic doctrine, for the freedom of the individual involves freedom to combine and men acting in association are, upon this hypothesis, entitled to the same freedom which is allowed to them as individuals. The law relating to combinations, therefore, should hold the balance fairly — between the interests of the individual and the interests of the community, and should discriminate between the legitimate use and the abuse of freedom."

This principle has been well recognized in its application to many of the activities of the people of a free nation, *e.g.*, the freedom of association in matters of common interest, namely, labour relations, trade associations, social and other clubs. Therefore, it seems to me unarguable that an association of landowners by means of common covenants is contrary to the long-accepted principle of freedom of association — and that only when such association becomes unreasonable and unduly oppres-



sive of the public generally, should it be restricted or voided either by the Courts or the Legislatures.

I can find nothing in the scheme of covenants in the association in this case which could be suggested, with an atom of reason, as being unduly oppressive of the public.

I would dismiss the appeals.

HOGG J.A.:—On the 11th June 1948, it was declared by Mr. Justice Schroeder following argument upon a motion brought in pursuance of The Vendors and Purchasers Act, R.S.O. 1937, c. 168, that the restrictive covenant with which the said motion was concerned, contained in a certain deed of conveyance from The Frank S. Salter Company Limited to the vendor, dated 15th January 1933, was a valid and enforceable covenant and that the vendor had not satisfactorily answered the purchaser's objection thereto.

A somewhat anomalous circumstance exists in connection with this appeal because of the fact that notice of appeal to this Court from the aforesaid order is given not only by the vendor, but also by the purchaser, upon identical grounds, and that the opposition to the appeal comes from more than 40 owners of lands immediately adjacent to that involved in the application who, the Court was informed by Mr. Morden, are almost all of the persons owning land in the Beach O'Pines Development, to which reference is later made.

The incorporated company above mentioned owned a tract of land of considerable extent in the county of Lambton, touching on the waters of Lake Huron. This property was sold by the aforesaid company in various parcels and is now owned by those persons who are the respondents to this appeal, and the vendor. It was purchased and held with the object of constituting a restricted summer resort and with this purpose in view these various persons owning the aforesaid parcels of land formed an organization known as Beach O'Pines Protective Association. The members of this community have been active in developing the aforesaid area known as Beach O'Pines Development, as an attractive summer place of residence. They have constructed and maintained roads, provide police and fire protection, and have engaged in other projects with a view to the improvement of the area for the purposes for which it was acquired.

The property in question in this application was sold by the aforesaid company to the vendor to whom was delivered a deed of conveyance bearing date the 16th January 1933, which was duly registered in the Registry Office for the Registry Division of the County of Lambton on the 30th January 1933. This conveyance contains the restrictive covenant involved in this appeal. The covenant reads as follows [see *supra* p. 513]:

James Book, who is the secretary of the Beach O'Pines Protective Association, states in an affidavit, which forms part of the evidence before the Court, that he has knowledge of the restrictions covering the lands included in the said development, that are contained in the vendor's deed of conveyance from the Salter company. I think it may be inferred from the language of this affidavit that the restrictive covenant was contained in all of the deeds of conveyance of the lands included in the area known as the Beach O'Pines Development.

[His Lordship here quoted the requisition and the answer, set out the grounds of appeal, and proceeded:] — The fourth ground of appeal would appear to be related to the first and third grounds.

Mr. Denison, in an able and learned argument, sought to show that clause (f) of the covenant stands in a distinctive position as compared to the other clauses, which deal entirely with building restrictions, in that the said clause (f) does not, to use his words, cast any burden on the land itself, that is to say, it is not concerned in any manner with the use of the land but is solely an attempted method to prevent certain classes of persons acquiring the land. He argued that the covenant did not run with the land, and such being the case, and because its purpose did not concern the actual use of the land but was merely personal to the covenantee, the equitable principle established by *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143, as qualified by subsequent cases, would not govern and could not, therefore, be applied. He contended that the covenant, as it concerned a personal matter only and was unrelated to the use of the land, could not be and is not effective, but is void as against subsequent purchasers.

As against this proposition, it was contended by Mr. Morden that the principle of law laid down by Lord Cottenham in *Tulk v. Moxhay*, *supra*, has been so modified by the later cases that the

governing principle is not based upon the fact that it is the use of land that is involved but rests upon the fact that the restrictive covenant creates an equitable interest in the land in the nature of a negative easement. He also argued that there existed a building scheme, as each purchaser of land was aware of the extent of the area to which the covenant applied and the extent of the burden as well as the benefit imposed upon him or her. The further question may also arise as to whether the purchaser could be restrained from disregarding the covenant entered into by the vendor at the suit of other owners who also purchased from the Frank S. Salter Company, the portions of the land they own which have the benefit of and are subject to a similar restriction. The question of intention is considered in *Besinnett v. White*, 58 O.L.R. 125, [1926] 1 D.L.R. 95, and *West v. Hughes*, 58 O.L.R. 183, [1926] 1 D.L.R. 359.

It is true that an appellate Court may allow points of law not taken in the Court of first instance to be raised upon appeal, but, in the present case, not only was the point of law argued by Mr. Denison not involved in the reply to the requisition on title and not raised upon the hearing of the original application, but it was not one of the grounds of appeal to this Court and all of the parties who would be affected by the decision of this Court upon this aspect of the case were not before the Court. For these reasons I do not think the point in question can be considered upon this appeal.

Even if this point were open for consideration, in my view the procedure applicable to a motion under The Vendors and Purchasers Act is not a proper means of arriving at the solution of a problem involving the meaning and effect of the covenant and the question whether it could be enforced by the owners of the adjacent properties; also the question as to whether the covenant is void for uncertainty. If action had been brought to enforce clause (f) of the covenant, evidence could have been given as to all of the facts required to be ascertained in order that the principle of law applicable could be determined.

In a consideration of the ground for appeal that the covenant in question was void as being contrary to public policy, reference may be made to the last edition of Sir Frederick Pollock's *Principles of Contract* (12th ed. 1946), where the doctrine of public policy is discussed at very considerable length and the various



heads under which it has been held that certain matters are against public policy are set out. At p. 291, the following opinion is expressed:

“Finally, two limits on the application of public policy may be noticed. First, arguments based upon it are irrelevant where they relate to a rule of the common law that is already clearly settled. Secondly, public policy is emphatically not an ideal standard to which the law ought to conform. No doubt the founders of our law spoke of ‘reason’, ‘the law of reason’, the ‘law of nature’ with a vision of some ethical abstraction to which they wished to make the law conform, but that vision has long passed from public policy as we now understand the phrase.”

At p. 289 it is said that the prevailing modern view is expressed by Jessel M.R. in *Printing and Numerical Registering Company v. Sampson* (1875), L.R. 19 Eq. 462 (which I have set out in referring to the judgment of Lord Atkin in *Fender v. St. John-Mildmay*, [1938] A.C. 1, [1937] 3 All E.R. 402), and that no further attempts to invent a new head of public policy “will be made in our time; nor will the particular doctrine of *Egerton v. Brownlow* [*infra*] be extended”. In discussing the heads under which it has been held that the doctrine of public policy may be invoked reference is made, at p. 317, to one of such classes, namely, agreements unduly limiting the freedom of individual action. It is then said that: “As a rule a man may bind himself to do or omit, or procure another to do or omit, anything which the law does not forbid to be done or left undone. The matters as to which this power is specially limited on grounds of general convenience are: (i) Marriage, (ii) Testamentary dispositions, (iii) Trade.”

In the remarkable case of *Egerton v. Earl Brownlow et al.* (1853), 4 H.L. Cas. 1, 10 E.R. 359, the judges were summoned to the House of Lords to answer certain questions of law arising in the appeal, which concerned the disposition by will of the estates of the Earl of Bridgewater. Lord Chief Baron Pollock and Lord St. Leonards claimed for the Courts an almost unlimited right to decide when a contract was against the public welfare or good. On the other hand Baron Parke said: “Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights . . .”

The attitude of the Courts towards the application of the principle appears to have changed most materially during the past hundred years as circumstances, and the opinion of the community generally, have altered. In contrast to the opinion expressed in 1853 by Pollock C.B. and Lord St. Leonards are the opinions of the law lords in the comparatively recent case of *Fender v. St. John-Mildmay*, *supra*. In this appeal the House of Lords were emphatically against the extension of the doctrine of public policy with respect to the law relating to the subject of marriage. Lord Atkin referred at length to the judgments in *Janson v. Driefontein Consolidated Mines, Limited*, [1902] A.C. 484, where it was said by Lord Davey: "Public policy is always an unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline." Lord Atkin also quoted the passage from the judgment of Jessel M.R. in *Printing and Numerical Registering Company v. Sampson*, *supra*, where that distinguished Master of the Rolls said:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."

Lord Atkin was of the opinion that the view taken by Lord Halsbury in the *Driefontein* case that the categories of public policy are closed and that that principle could not be invoked unless the case could be brought within some principle of public policy already recognized by the law, seemed too rigid, but in his opinion the doctrine should only be invoked "in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inference of a few judicial minds".

The expression of opinion by Lord Thankerton would seem to set out in clear and unambiguous language the modern conception of the doctrine of public policy. He said at p. 23:

"In the first place, there can be little question as to the proper function of the Courts in questions of public policy.

Their duty is to expound, and not to expand, such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy. Such a case might well arise in the case of safety of the State, for instance. But no such case is suggested here. Further, the Courts must be watchful not to be influenced by their view of what the principle of public policy, or its limits, should be."

In *Mogul Steamship Company, Limited v. McGregor, Gow & Co. et al.*, [1892] A.C. 25, Lord Bramwell, in the House of Lords, said at p. 45: "No evidence is given in these public policy cases. The tribunal is to say, as a matter of law, that the thing is against public policy, and void. How can the judge do that without any evidence as to its effect and consequences?" He referred to the language used by Cave J. in *In re Mirams*, [1891] 1 Q.B. 594, where he said that certain kinds of contracts have been held void at common law on the ground of public policy, "a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy".

A case in our own Court in which the question of public policy is discussed at some considerable length is that of *Walkerville Brewing Co. Ltd. v. Mayrand*, 63 O.L.R. 573, [1929] 2 D.L.R. 945. The judgment appealed from, which was pronounced upon a motion for judgment, held that a contract providing for the export of intoxicating liquors from Ontario to the United States, contrary to the prohibition laws in force in that country, was unlawful as being contrary to public policy. This judgment was set aside. Hodgins J.A. quoted at length from the judgment of Lord Halsbury L.C. in the *Driefontein* case. He then said at p. 581:

"While I agree that the question of public policy may arise from different considerations than those founded upon explicit enactment, I do not agree that public policy can be based upon the views of a judicial officer founded upon his individual conception of 'justice, morality and convenience', nor unless the same comes within some established principle of law or follows directly from principles recognized in the courts and by the State as part of its public law."



It was argued that the Parliament of Canada in The Naturalization Act, R.S.C. 1927, c. 138, and The Canadian Citizenship Act, 1946, 10 Geo. VI, c. 15, also the Ontario Legislature in The Aliens' Real Property Act, R.S.O. 1937, c. 151, have indicated the policy of both the Dominion and the Province towards aliens, interpreting the word "alien" as a word signifying a person of a certain race rather than of a foreign nationality. Assuming the aforesaid meaning given to the word "alien", this argument would seem to support the view that the Courts should not attempt, by judicial decision, to encroach upon a subject which has already been a matter occupying a field of recent legislation. The Aliens' Real Property Act provides that the real estate in Ontario of an alien dying intestate shall descend as if it were the property of "a natural born or naturalized subject of His Majesty". No evidence has been presented that the parties to this appeal are not British subjects and citizens of this country. The statute merely brings an alien within the ordinary law.

The present case cannot, in my opinion, be brought within any of the classes concerning which the principle of public policy, as recognized by law, is applicable. This is not a case in which, to use the words of Lord Atkin in *Fender v. St. John-Mildmay*, *supra*, "the harm to the public is substantially incontestable".

It was argued that the doctrine of public policy should be extended to embrace the present case because of the principles expressed and adopted by the General Assembly of the United Nations and the international bodies and charters mentioned by Mr. Justice Mackay in *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674; also because of opinions expressed in certain judgments in the Supreme Court of the United States. As was said in the carefully considered judgment of Schroeder J., the obligations set out in the United Nations charter do not seem to have been made a part of the law of this country or of this Province by any legislative enactment of either the Dominion Parliament or the Ontario Legislature. Nor can the statement made by Lord Thankerton in the *Fender* case be disregarded, that: "There can be no justification for expanding the principles of public policy in this country by reference to the public policy of another country." This expression of the law, in my view, applies as well to the principles and obligations set forth in international covenants or charters, such as the United Nations

charter, until such time as they should be made a part of the law of the land.

I cannot conclude that the covenant now under consideration can be held void upon the grounds of public policy.

The further ground of appeal based upon the assertion that the clause of the covenant complained of is void for uncertainty was stressed by Mr. Cartwright in his lucid and forcible argument.

He contended that because, as was held in *Clayton et al v. Ramsden et al.*, [1943] A.C. 320, [1943] 1 All E.R. 16, the precise degree of percentage of Hebraic blood in the purchaser could not be ascertained, the restrictive covenant must be held to be void. In the above-mentioned case a testator gave a legacy to an unmarried daughter, but upon the condition that she should forfeit such benefit if she should marry a person "not of Jewish parentage and of the Jewish faith." The sole matter with which the *Clayton* case was concerned was the attempt on the part of the testator, by means of a defeasance clause, to compel a person to whom a benefit was given by his will to act, or to refrain from acting, as the testator desired. Lord Romer said at p. 332 that in such case the testator must "define with the greatest precision and in the clearest language the events in which the forfeiture of the interest given to the beneficiary is to take place". He said that this principle had long ago been settled in *Clavering v. Ellison et al.* (1859), 7 H.L. Cas. 707, 11 E.R. 282. It was held that because the degree or percentage of Jewish blood in the husband of the testator's daughter in order to satisfy the requirement that he should be "of Jewish parentage"—meaning of Jewish race or descent—could not be precisely determined, the condition of forfeiture was therefore void for uncertainty.

A condition entailing the forfeiture of a vested estate is regarded most strictly. Lord Atkin, at p. 325, said that he viewed with disfavour the power of testators "to control from their grave the choice in marriage of their beneficiaries, and [would] not be dismayed if the power were to disappear". Lord Wright, at p. 329, said: "... a testator who wishes to leave an estate or interest subject to a defeasance clause must be very careful, or his lawyers must be very careful, how the clause is expressed." Lord Romer also was of a like opinion and said that although such a result may be accomplished, the event which

will cause the forfeiture of the interest given must be defined "with the greatest precision". In the present case no question of the forfeiture or divesting of a vested interest or estate arises and it is not, in my opinion, the rule or test declared in *Clavering v. Ellison et al.* that governs, but the rule to be applied is that which is invoked in the interpretation and construction of covenants in a deed of conveyance or like instrument.

In *Pearson v. Adams* (1912), 27 O.L.R. 87, 7 D.L.R. 139 (reversed 28 O.L.R. 154, 12 D.L.R. 227, but restored 50 S.C.R. 204), a restrictive provision in a deed stipulated that the land could be used only in a certain manner. Riddell J., who delivered the judgment of the majority of a Divisional Court, quoted from the judgment of Meredith C.J.C.P. in *Re Robertson and Defoe* (1911), 25 O.L.R. 286, as follows:

"In order to ascertain the scope and effect of covenants . . . regard must be had to the object which they were designed to accomplish: *Ex p. Breull, In re Bowie* (1880), 16 Ch. D. 484; and the language used is to be read in 'an ordinary or popular and not in a legal and technical sense:' *per* Collins, L.J., *Rogers v. Hosegood*, [1900] 2 Ch. 388, 409." Mr. Justice Riddell then said: "that is what James, L.J., in *Hext v. Gill* (1872), L.R. 7 Ch. 699, at p. 719, calls the 'vernacular'."

In his very carefully prepared argument, one of the matters referred to by Mr. Morden was the fact that those who are responsible for the Dominion census ascertain, for the various territorial divisions of Canada, the population and the classification of that population, under various heads, including nationality and race. The information from which such classification is made is obtained through the inquiries made by census commissioners, enumerators or agents: The Statistics Act, R.S.C. 1927, c. 190, ss. 5 and 19. It would not be possible for those whose duty it is to obtain information in taking a census of the population to ascertain the precise degree or percentage of any race or blood in an individual. The classification must necessarily be made having regard to the word "race" in its ordinary and popular sense.

If the language of clause (f) of the covenant is regarded in its ordinary and popular sense, this clause cannot be said to be void for uncertainty because the exact degree of race or blood in any person among those set out in the aforesaid clause cannot be ascertained.



With regard to the ground of appeal that the covenant is void as a restraint upon the freedom of alienation of the land thereby affected, the authorities generally cited upon this subject are concerned with restrictions upon alienation in connection with devises of real property. In *Re Porter* (1907), 13 O.L.R. 399, it was said that the Courts of this Province have consistently adopted the view that alienation may be restricted to a particular class and the judgment in *Blackburn et al. v. McCallum* (1903), 33 S.C.R. 65 was considered and discussed. In that appeal to the Supreme Court of Canada, Davies J. (afterwards C.J.C.) said that *In re Macleay* (1875), L.R. 20 Eq. 186, and certain other cases cited, supported the contention that a restriction upon alienation limited to a specified class only might be good, but expressed the opinion that a time limitation might be necessary because of the rule against perpetuities. The reference to this rule would seem to be *obiter* on the part of Davies J. as the sole question raised in the appeal was whether a general restriction upon alienation which, if unrestricted as to time, would be admittedly bad, is made good by a time limitation. In reference to *Doe d. Gill v. Pearson* (1805), 6 East 173, 102 E.R. 1253, and to *In re Macleay*, Davies J. said at p. 79: "These two cases determine that a restriction upon alienation prohibiting it to a particular class of individuals is good." He disclaimed any intention of overruling either of the aforesaid cases, although he said the judgment in the *Macleay* case had been criticised by Pearson J. in *In re Rosher; Rosher v. Rosher* (1884), 26 Ch. D. 801.

In *Re Martin & Dagenau* (1906), 11 O.L.R. 349, Magee J. (afterwards J.A.) reviewed at length the authorities upon the point and concluded that the *Macleay* judgment was not affected by the decision of the Supreme Court of Canada in *Blackburn v. McCallum*, *supra*, except in so far as was necessary to deal with the case actually before the Court.

In *In re Macleay* the issue to be determined was whether a devise of land to one person on condition that he never sold it out of the family was valid. Sir George Jessel M.R. stated that the test was whether the condition took away the whole power of alienation. The following passage is from his judgment at p. 189:

"Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, you may restrict alienation by restricting it to a particular time."

The Master of the Rolls further said that if the restriction were unlimited as to time "it would be void for remoteness under another rule", the reference being no doubt to the rule against perpetuities, because the matter involved in the appeal was a gift under a will.

I think the facts of the case now under consideration are such that the law upon the point stated in the *Macleay* case, *supra*, is to be applied, and that the restriction contained in the covenant should be held to be an exception to the general rule respecting restraint upon alienation.

For the reasons I have given, I think the appeals should be dismissed, with costs against the appellants.

AYLESWORTH J.A. agrees with ROBERTSON C.J.O.

*Appeals dismissed with costs.*

*Solicitors for the vendor, appellant: Carrothers, McMillan & Egener, London.*

*Solicitor for the purchaser, appellant: Edward Richmond, London.*

*Solicitors for other owners, respondents: Day, Wilson, Kelly, Martin & Morden, Toronto.*

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[SCHROEDER J.]

**Re Comstock.**

*Powers of Appointment—Gift of Dividends on Company Shares for Life, with Power to Appoint Shares by Will, and Gift over in Default of Appointment.*

A testator, after providing for legacies for his son and each of his three daughters, gave the residue of his estate (including a large block of shares in a company controlled by him) to his executors, to be held until his youngest child came of age, whereupon they were to transfer 900 shares to the son "and then to divide the remaining shares therein equally among all my children, but the shares of my daughters are to be transferred to them in such manner that they receive only the dividends therefrom during their life. . . . At death, however, to go as directed by will (power to devise same being hereby devised) and failing such will to their children, or if no children, to their respective heirs."

*Held*, the daughters took only a life estate in the shares, with power to appoint them by will. The case was not within the authorities, such as *Weale v. Ollive* (1863), 32 Beav. 421, and *Southouse v. Bate* (1851), 16 Beav. 132, where an indefinite gift of income, coupled with a power of appointment as to corpus, had been held to confer an absolute gift. There was here no indefinite gift of income, but a gift of dividends arising from the shares in question, limited to the period of the daughters' lives. Nor was the case within the line of authorities where, because the donee of the power might appoint to himself, he was held to be entitled to the fund absolutely, since the power here was exercisable by will only, and was consequently not a general power. *In re Berwick Estate; Berwick v. The Canada Trust Company*, [1948] S.C.R. 151, applied; *In re Mewburn Estate; Robinson v. The Royal Trust Company*, [1939] S.C.R. 75; *In re Templeton Estate; Templeton v. The Royal Trust Company* (1936), 44 Man. R. 154, distinguished; other authorities reviewed.

*Executors and Trustees—Powers of Survivors—Express Direction in Will as to Minimum Number—Appointment of Successors—The Trustee Act, R.S.O. 1937, c. 165, ss. 3, 25, 66.*

A testator, after appointing four executors, expressly directed that there should at all times be at least three executors, and that if by reason of death or refusal to act there remained at any time only two, a third executor should be appointed by the survivors. The number of executors fell to two.

*Held*, the surviving executors must immediately appoint a third executor. Section 25 of The Trustee Act, empowering a survivor or survivors to exercise any powers or trusts, was subject to s. 66, which provided that no trustee should do anything forbidden by the instrument creating the trust, or omit to do anything expressly directed. *Re Gooderham*, [1947] O.W.N. 83, followed.

A MOTION for the opinion, advice and direction of the Court.

26th May 1949. The motion was heard by SCHROEDER J. in Weekly Court at Toronto.

W. R. Wadsworth, K.C., for the surviving executors, applicants.

Hamilton Cassels, K.C., for the daughters of the testator.

P. D. Wilson, K.C., Official Guardian, for infants and unborn persons.



10th June 1949. SCHROEDER J.:—This motion is brought on behalf of the surviving executors of the last will and testament and codicils thereto of William Henry Comstock, deceased, for the opinion, advice and direction of the Court on certain questions arising in connection with the administration of the estate of the deceased. The following questions were propounded for adjudication:

“1. Upon the true construction of the said will and codicils, and in the events which have happened, and having regard particularly to the provisions contained in the following words in Clause twenty-eight of the said will:

“‘Upon my youngest child coming of age I direct my Executors to transfer to my son William Henry Comstock, Junior, nine hundred shares of The W. H. Comstock Company, Limited, and then to divide the remaining shares therein equally among all my children, but the shares of my daughters are to be transferred to them in such manner that they receive only the dividends therefrom during their life and during marriage for their separate use, free from the control of any husband. At death, however, to go as directed by will (power to devise same being hereby devised) and failing such will to their children, or if no children, to their respective heirs.’

and to the provisions of the first codicil to said will:

“(a) Have the shares of The W. H. Comstock Company, Limited, which are to be transferred to the daughters of the testator and of his wife Alice Janet Comstock under the above-quoted provisions, vested in them absolutely; if so, at what date?

“(b) If such shares have not vested, should the undistributed profits held by The W. H. Comstock Company, Limited, in respect of such shares be treated as capital or as income—(i) At the date of the death of the testator; (ii) From and after the 12th day of July 1921 (on which last-mentioned date Griswoldene Chaffey Lewis, the youngest child of the testator, became of the age of 21 years); (iii) Or howsoever otherwise?

“2. Whether, upon the true construction of the said will and in the events which have happened, and having regard particularly to the provisions contained in the following words in the first clause of the said will:

“‘I further will and direct that there shall at all times be at least three executors of my said Estate, and if by reason of

death or refusal to act, there shall at any time remain but two executors, I do empower and authorize these two surviving executors to name a third executor, and in the event of the inability of such two surviving executors to agree upon the appointment of a third executor such appointment shall be made by the Judge of the Surrogate Court for the time being of the United Counties of Leeds and Grenville.'

and to the provisions of sections 3 and 5 of The Trustee Act —

"(a) Should one or more additional executors (or trustees) be appointed to the end that there shall be at least three executors (or trustees).

"(b) If so, can the applicants make such appointment?"

At the request of the parties, I made an order appointing the Official Guardian to represent, for the purposes of this motion, the unborn children of Esther Lee Langmuir, Wilhelmina Henrietta Brownfield and Griswoldene Chaffey Lewis, the three daughters of the deceased.

During the argument it appeared that the material was insufficient and incomplete to enable the Court to deal with the matters raised by question 1(b), and at the request of counsel for the executors, with the consent of all parties, they were permitted to withdraw question 1(b) without prejudice to their right to have the question adjudicated upon at some later period upon proper and sufficient material.

It will be convenient to deal first with questions 2(a) and (b). The material filed establishes the fact that two of the four executors named in the will, and to whom letters probate were issued, have died since the appointment, leaving only the two executors now before the Court to carry out the provisions of the will. A similar situation was dealt with by Mr. Justice LeBel on a vendors and purchasers motion in *Re Gooderham*, [1947] O.W.N. 83, [1947] 1 D.L.R. 856, where it was held that s. 25 of The Trustee Act, R.S.O. 1937, c. 165, which provides that: "Where a power or trust is given to or vested in two or more trustees jointly it may be exercised or performed by the survivor or survivors of them for the time being" was subject to s. 66, which reads as follows: "Nothing in this Act shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do by the instrument creating the trust."

Question 2(a) will, therefore, be answered as follows: An additional executor should be appointed to comply with the minimum requirements of the will in this connection. And question 2(b) will be answered as follows: Such an appointment can be made by the two surviving executors and trustees: *vide* s. 3 of The Trustee Act.

This leaves for consideration and determination the first and most important question propounded on the motion, namely, question 1(a). It is contended by counsel for the three daughters of the deceased, above named, that the disposition of the shares of The W. H. Comstock Company, Limited, made in their favour by the last will and testament of the deceased, vested the shares in them absolutely. The Official Guardian, representing the infant children of Griswoldene Chaffey Lewis, and by order of the Court representing the unborn children of all three daughters of the deceased, submits that the interest in the said shares conferred upon the testator's daughters is only a life interest with a power of appointment to be exercised by will. I have been referred to numerous authorities in support of the respective contentions put forward by counsel, and it is unnecessary for the purpose of disposing of the matters raised on the present motion to discuss them in detail. In view of the submissions advanced, it is of prime importance to determine at the outset the nature of the interest which the testator intended to confer upon his daughters. Reference has been made to clause 15 of the will and to the first clause of the first codicil to the said will, which for purposes of convenience are reproduced hereunder:

*"Fifteenth:* I Give and Bequeath to my children by my present wife the sum of Twenty thousand dollars in cash each at their respectively coming of age, and also one hundred shares each in the said The W. H. Comstock Company, Limited. Should any of such children die under age and without issue the bequests so given to the one or more so dying shall go to the survivors, and if all so die then said bequests are to be divided between the following persons, viz., my said wife, each of the children of my daughter Kate Louise Cossitt, Henry Chaffey Gates, Ouida Gates Palmer and Bessie Gates McClean, share and share alike."

Codicil dated the 10th April 1916: "First: In order that there may be no misunderstanding of my intention as expressed in the Twenty-eighth paragraph of my said Will, I Will and Direct that



the children therein referred to (among whom the remaining shares of the Capital Stock of The W. H. Comstock Company, Limited, are to be divided) are the children by my present wife."

It is also important to consider the terms and provisions of the whole of clause 28 of the will, reading as follows:

*"Twenty-eighth:* I Give, Devise and Bequeath all the rest, residue and remainder of my estate both real and personal (and including my remaining shares in the capital stock of The W. H. Comstock Company, Limited), unto my Executors upon trust to invest and keep the same invested and set apart and to accumulate same until my youngest child shall come of age, subject, of course, to the payment of dividends upon the shares of stock in The W. H. Comstock Company, Limited, herein devised to my said children by my said wife as directed in the ninth paragraph hereof, and subject to the further provision that I will and direct that as each child comes of age the dividends upon his or her share (estimated upon the Basis that all the children then living would live until the youngest becomes of age) shall from that time be paid to him or her. Upon my youngest child coming of age I direct my Executors to transfer to my son William Henry Comstock, Junior, nine hundred shares of The W. H. Comstock Company, Limited, and then to divide the remaining shares therein equally among all my children, but the shares of my daughters are to be transferred to them in such manner that they receive only the dividends therefrom during their life and during marriage for their separate use, free from the control of any husband. At death, however, to go as directed by will (power to devise same being hereby devised) and failing such will to their children, or if no children, to their respective heirs. At the said coming of age of my youngest child I will and direct my Executors to divide the rest and residue of my estate equally share and share alike absolutely between all of my children with the proviso, however, that the total amount or value which each of my children by my present wife shall receive under the provisions of this will shall amount to at least Two hundred and fifty thousand dollars (\$250,000). The share of my child by my first wife (or of her heirs should she not be living at the time of such distribution) to abate if necessary, accordingly."

In clause 28 the testator makes an absolute gift of 900 shares of the company to one of the children, namely, his son William

Henry Comstock, Junior, and a clear distinction is made between the gift of the son's portion of the remaining shares of the company and the gift provided therein for his daughters. It would seem that the deceased had four children by a second marriage—a son and three daughters. The direction is: “and then to divide the remaining shares therein equally among all my children, but the shares of my daughters are to be transferred to them in such manner that they receive only the dividends therefrom during their life and during marriage for their separate use, free from the control of any husband. At death, however, to go as directed by will (power to devise same being hereby devised) and failing such will to their children, or if no children, to their respective heirs”.

The reading of clause 15 and of the provisions of clause 28 of the will in favour of the testator's son makes it abundantly plain that the testator well knew how to express his intention to make an absolute gift. It can hardly be argued that para. 1 of the first codicil to the will (quoted above), and the use of the word “divided” in that paragraph, modifies or affects in any manner the character of the gift which the testator intended to make in favour of his daughters. Obviously, the underlying purpose of the codicil was further and more completely to identify the objects of the gift and to provide greater certainty so as to ensure that the shares referred to in clause 28 of the will would go to the children of his then wife.

I cannot conceive how it is possible to spell out of the words used by the testator in clause 28 of his will an intention to confer on his daughters an interest greater than a life interest. The direction that the shares are to be “transferred to them” has no special significance, in my view, because of the words which follow, namely, “in such manner that they receive only the dividends therefrom during their life”. In *Re Plant*, [1946] O.R. 521, [1946] 3 D.L.R. 847, the direction of the testatrix to have her bonds and money in the bank “put in my mother's name” did not prevent the conclusion from being drawn that the testatrix intended to do no more than to give her mother a life interest with power in the particular circumstances to encroach upon the capital.

The argument advanced on behalf of the daughters is two-fold: (1) that there is an absolute gift to them followed by

words sounding like a power with a gift over, which is repugnant and void; (2) that even if the gift was a gift of income only, with a power to dispose of the corpus by will, with gifts over in default, the daughters are not thereby prevented from taking an absolute interest.

“Where there is an absolute gift, whether of reality or personalty, followed by words sounding like a power, whether general or limited, with a gift over if it be not exercised, the gift over is repugnant and void”: Farwell on Powers, 3rd ed. 1916, p. 75, citing *Holmes v. Godson* (1856), 8 DeG. M. & G. 152, 44 E.R. 347; *Gulliver v. Vaux* (1746), 8 DeG. M. & G. 167, 44 E.R. 353; *Lightburne et al. v. Gill et al.* (1764), 3 Bro. Parl. Cas. 250, 1 E.R. 1300; *Parnell v. Boyd*, [1896] 2 I.R. 571; *In re Dixon; Dixon v. Charlesworth*, [1903] 2 Ch. 458.

This submission is predicated upon the claim that the gift intended to be made by the testator to his daughters was an absolute one. If this cannot be established, then this branch of the argument must fail. Having already indicated that in my view it appears from the codicil and from other provisions in the will that the testator intended to give to his daughters purely a life interest in the shares with a power of appointment exercisable by will, there is no need to consider this point further.

I come now to a consideration of the second branch of the daughters' contention. The proposition upon which this argument is founded is to be found in such cases as *Weale v. Ollive* (1863), 32 Beav. 421, 55 E.R. 165, and *Southouse v. Bate* (1851), 16 Beav. 132, 51 E.R. 727. An examination of both of these cases reveals the fact that there was an indefinite gift of income or dividends made to the donees, and it was held in those cases that a superadded power to dispose of the corpus by will did not derogate or detract from the prior absolute gift. These cases are clearly distinguishable in that in the case at bar there was not an indefinite gift of income but there was plainly a gift of dividends arising from the shares in question, limited to the period of the daughters' lives.

There are numerous cases in which it has been held that a combination of a life interest in personalty with a power of appointment or disposition over the corpus may in effect be an absolute gift without any necessity for the donee of the power either to exercise or to release it. In *Jarman on Wills*, 7th ed. 1930, at



pp. 1155-61, there is a discussion of the cases dealing with express gifts for life which may be enlarged into an absolute interest. At p. 1160, the learned author states that the result of the authorities discussed by him would appear to be as follows:

“(1) A gift to A for life, with a power of appointment by deed or will, with a gift over away from A or his estate, or with no gift over, gives A entire dominion over the fund, and therefore if he applies to the Court for it the Court need not require a formal appointment of the fund, as his application to the Court is a sufficient intention to take the fund. (See *Irwin v. Farrer*, 19 Ves. 86 [34 E.R. 450]).

“(2) If the power of appointment in the last case had been by will only, the Court would not decree payment because an appointment by will must be executed in accordance with the Wills Act.

“(3) If there is a gift over to A's executors and administrators, then, whether the power is by deed or will, or by will alone, there is substantially an absolute gift to A, and consequently the Court will make an order for transfer without requiring an appointment or a release of the power.”

*In re Mewburn Estate; Robinson v. The Royal Trust Company*, [1939] S.C.R. 75, [1939] 1 D.L.R. 257, is a case in which the problem presented is somewhat similar to the problem arising in the case under consideration. In that case the testator, after making certain specific gifts, directed that his trustee should stand possessed of the residue of the estate upon trust for conversion, and, after payment of debts, etc., to invest the residue and pay the income therefrom to the testator's wife during her life and upon her death to pay a certain share thereof to a son, and to invest one-half of the residue in trust to pay the income therefrom to another son during his life (with power to pay him a limited sum from the principal) and upon his death his share (or so much thereof as had not been received by him) was to “go and be disposed of as he may by deed or will appoint”, with a gift over in default of appointment. As to the remaining half of the residue the following provision was made: to invest it in trust to pay the income therefrom to the testator's daughter during her lifetime “and upon her death said share to go and be disposed of as she may by deed or will appoint”, and in default of such appointment (or so far as it should not apply), if she

should die leaving issue then living, the share to go to her child or children then living, equally, to be paid to each on attaining 21 years of age, the income in the meantime to be applied for support, etc., during respective minorities; if she should die without leaving issue then living and without having made any such appointment as aforesaid, the share was to go to the testator's two sons equally or to the survivor of them. The daughter having demanded payment of the share covered by this provision, it was held that the daughter could exercise her said power of appointment by deed in her own favour so as to vest in her immediately her share of the residue of the estate and so as to entitle her to have the same transferred to her immediately. At p. 83, Kerwin J. said:

"In the present case, I conclude that the daughter's life interest, coupled with a power to appoint the corpus by deed, enables her so to appoint to anyone, including herself. The testator's manifest intention is contrary to the authority he conferred upon her. By giving his daughter a power to appoint by will only, he could have ensured that his wishes should be respected."

In *In re Templeton Estate; Templeton v. Royal Trust Company*, 44 Man. R. 154, [1936] 2 W.W.R. 347, [1936] 3 D.L.R. 782, the majority of the Manitoba Court of Appeal determined, notwithstanding the clear intention of the testator that only on the death of the life tenant should the corpus be distributed as he might direct, that as the power of appointment was exercisable by deed the life tenant could exercise it in that manner in his own favour so as to entitle him to have the corpus transferred by the trustee of the testator's will to him immediately.

*In re Jones Estate*, [1948] 2 W.W.R. 927, [1949] 1 D.L.R. 126, is a case of considerable interest. Williams C.J.K.B. reviews many of the relevant authorities and distinguishes the case of *In re Mewburn Estate*, *supra*, having regard to the facts of the particular case. In the *Jones* case, a testatrix directed that each of her two grandsons, for whom the residue of her estate was directed to be held in equal shares, be paid during his lifetime the annual income of his share "or so much of such net income and/or the corpus of such share as my trustee shall think advisable" for his support, etc. The will further directed that upon each of the grandsons attaining the age of 21 years he

should be given "a power of appointment, operative on his death, in respect of the share of my residuary estate held for his benefit, such share to be thus disposed of as such grandchild shall by deed or will appoint, or failing such appointment or insofar as such appointment shall not extend, to be distributed as though I had died intestate immediately after the death of the survivor of my grandsons". On an application made after both grandsons had attained the age of 21 years, it was held that the words "*operative on his death*" (italics by the judge) took this clause out of the rule applied in *In re Mewburn Estate*, *supra*, and in *In re Templeton Estate*, *supra*; and their effect was not altered by the subsequent words "such share to be thus disposed of as such grandchild shall by deed or will appoint". It was held further that the power was a limited or qualified power. It was exercisable only by will or deed operative on the death of the donee, and was therefore distinguishable from the power of "present disposition" in *Barford v. Street* (1809), 16 Ves. 135, 33 E.R. 935. In the case of a limited or qualified power such as the one there present the existence of a gift over was of importance in ascertaining the testator's intention, and the direction for distribution in the event of there being no appointment was a valid gift over. Another difference between the wills in the *Mewburn* and *Templeton* cases and that in the *Jones* case was that in the former cases the donee was given the income or net income for life while in the latter case there was no absolute gift of the income but only of so much thereof as the trustee might in its discretion think it advisable to pay. Therefore the trustee was held not to be authorized to accept a power of appointment from each of the grandsons in favour of himself and forthwith to pay him one-half of the income and of the capital of said residue; nor was either grandson entitled to receive forthwith from the trustee one-half of the said income and capital.\*

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\* Since delivery of my judgment herein my attention has been drawn to the fact that the judgment of Williams C.J.K.B. in this case has been reversed by a majority of the Court of Appeal of Manitoba: [1949] 1 W.W.R. 1093. The decision turns on the power of appointment in that case, which was exercisable by "deed or will", and has no bearing on the question which was before me for determination, involving a power of appointment exercisable by will only.



I am not persuaded that the power of appointment conferred upon the daughters is a general one, inasmuch as it can only be exercised through the medium of a will — the power must be executed in the manner prescribed.

Estey J. in *In re Berwick Estate; Berwick v. The Canada Trust Company*, [1948] S.C.R. 151, [1948] 3 D.L.R. 81, refers to a power of appointment to be exercised only by will as a "qualified power". See also *Bull v. Vardy* (1791), 1 Ves. Sup. 115 at 116, 34 E.R. 715, where the following is stated:

"When, therefore, a gift is made to anyone expressly *for life*, with a power of appointment, *by will* only, superadded, that power must be executed in the manner prescribed; for the property not being absolute in the first taker, the objects of the power cannot take without a formal appointment; but, where the gift is made *indefinitely*, with a superadded power to dispose by will *or deed*, the property vests absolutely. The distinction is, perhaps, slight, but it has been judicially declared to be perfectly established."

In Sugden on Powers, 1861, the learned author states at p. 622: "We have already had occasion to consider the effect of the creation of a power on the estates limited in default of appointment, and we have seen that whether the estate be real or personal, and whether the power be merely to distribute and fix the shares, or to select and exclude any of the objects of a class, and whether the power be general or special, the limitations in default of appointment are vested, subject to be divested by the exercise of the power, but that such a power will prevent the parties from being entitled to a transfer of the property, although they do take vested interests."

If, then, the gifts over in default of appointment are vested in the children of the daughters, or in the heirs of those having no children, subject to being divested by the exercise of the power of appointment, it can be readily observed that in the case of a limited or qualified power, such as the one expressed in the will under review, the existence of a gift over is of importance in ascertaining the intention of the testator.

The gift over, failing an appointment, in favour of the children of the donees of the power or, if there are no children, to their respective heirs, is, in my opinion, a valid gift over.

Counsel for the daughters did not contend that the rule in *Shelley's Case* (1581), 1 Co. Rep. 93b, 76 E.R. 206, was applicable in the particular circumstances existing in the case at bar, but he cited *Re Hooper* (1914), 7 O.W.N. 104, and *Re Helliwell* (1919), 16 O.W.N. 113, as instances in which the rule was applied. I do not consider these cases applicable in the present instance. The nature of the immediate gift over, in default of the exercise of the power, establishes a clear distinction between the case at bar and the two cases cited.

It should also be noted that *Re Hooper, supra*, was referred to by McRuer C.J.H.C. in *Re Woods*, [1946] O.R. 290 at 297, [1946] 3 D.L.R. 394, where His Lordship stated: "In coming to this conclusion I have not overlooked the decision in *Re Hooper* (1914), 7 O.W.N. 104. The report of that case does not disclose that the ground on which this case was argued was fully developed. It would appear that the two points that were considered were whether the passage referred to therein from Farwell on Powers applied, and whether the fact that the property was given to a married woman for her own separate use altered the application of the rule in *Shelley's Case*. It was held that it did not. *In re Onslow; Plowden v. Gaybord* (1888), 39 Ch. D. 622, was relied on. In that case no question of restraint on anticipation or alienation arose."

I am of the opinion that this case falls rather within the class of cases exemplified by *In re Berwick Estate, supra*.

For the reasons stated, I have reached the conclusion that under the will of the late William Henry Comstock his daughters are entitled only to a life interest in the shares in question, with a power of appointment to be exercised by will, and not to an absolute vested interest as they claim. Question 1(a) will, therefore, be answered in the negative.

The costs of all parties shall be paid out of the estate, those of the executors on a solicitor and client basis.

*Judgment accordingly.*

*Solicitor for the executors, applicants: G. Albert Beale, Brockville.*

*Solicitors for the three daughters of the testator: Cassels, Brock & Kelly, Toronto.*

[McRUER C.J.H.C.]

**Walker v. The McKinnon Industries Limited.**

*Nuisance—What Constitutes—Damage to Property, as Distinct from Interference with Enjoyment—Emission of Noxious Fumes over Greenhouses—Terms of Relief—Injunction—Damages.*

An actionable nuisance cannot be defined with exactitude, and each case must necessarily depend upon its own facts. A nuisance may be actionable either because it produces material injury to property or because it produces a sensible personal discomfort. Where it is of the first class it must be such as visibly to diminish the value of the property; the damage must be visible, actual and substantial. *Salvin v. North Brancepeth Coal Company* (1874), L.R. 9 Ch. 705; *Walter v. Selfe* (1851), 4 DeG. & Sm. 315; *Crumph v. Lambert* (1867), L.R. 3 Eq. 409, applied.

If the existence of a nuisance of this class is established, it is no defence to show that others have contributed to the damage, even if the defendant's act would not have amounted to a nuisance but for the fact that others, acting independently, did the same thing at the same time. *Salmond on Torts*, 10th ed. 1945, p. 229, approved; *Thorpe v. Brumfitt* (1873), L.R. 8 Ch. 650 at 656, referred to.

Although a plaintiff who asks for an injunction to restrain the violation of a common law right must prove both the existence of the right and the fact of its violation, once he has done so he is, except in very special circumstances, entitled as of course to an injunction to prevent the recurrence of that violation. *McKie v. The K.V.P. Company Limited*, [1948] O.R. 398 at 416, affirmed [1948] O.W.N. 812; *Shelfer v. City of London Electric Lighting Company*, [1895] 1 Ch. 287 at 314; *Imperial Gas Light and Coke Company v. Broadbent* (1859), 7 H.L. Cas. 600, applied.

The fact that a plaintiff has accepted compensation in money for a limited time in respect of an alleged nuisance should not preclude him from obtaining an injunction if it appears that he was advised by a competent solicitor that the Court would not grant an injunction against the defendant at that time because it was engaged in essential war work on a large scale.

AN ACTION for an injunction and damages.

11th, 12th, 13th, 14th; 25th, 26th, 27th, 28th April and 2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 16th and 17th May 1949. The action was tried by McRUER C.J.H.C. without a jury at St. Catharines.

*A. G. Slaght, K.C., R. I. Ferguson, K.C., and R. K. Ross, K.C.*, for the plaintiff.

*J. L. G. Keogh, K.C., and J. L. Pond*, for the defendant.

15th June 1949. McRUER C.J.H.C.:—This action is brought by the plaintiff, who carries on the business of growing flowers for sale, against the defendant, a company engaged in the manufacture of steel and iron products. Damages are claimed for injuries alleged to be suffered by the plaintiff by reason of the emission of smoke, noxious fumes, vapours and gases from the defendant's works, and an injunction is asked.



The plaintiff's property is between Carlton Street and Manchester Avenue in the city of St. Catharines. The noxious fumes complained of are said to be emitted from four cupolas situated about 600 feet in a southwesterly direction from the plaintiff's property, and a forge-shop and foundry situated about 400 feet in a more westerly direction.

The plaintiff purchased and took possession of his property in 1904 and built his first greenhouse in 1905 and since that time has carried on his business, enlarging his greenhouse space from time to time.

The property now owned and occupied by the defendant was previously owned and occupied by predecessor corporations, the history of which for the purpose of this action it is unnecessary to detail. It is sufficient to say that from 1925 until the present time it has carried on operations at the present location. Up until the year 1938 the plaintiff had no cause to complain about the manner in which the defendant or its predecessors in title had carried on their business. In 1936 the defendant built the present forge-shop, and in 1937 it enlarged its foundry, when the process of smelting iron was changed from two air-flow furnaces to three cupolas between 50 and 60 feet in height; two were built in 1937, the third in 1938, and in 1947 a fourth was added so that there might be an alternate to enable the defendant to operate three at a time when one was requiring repairs. The evidence is that only three operate at one time. The cupolas are fired by coke with combustion accelerated by a forced up-draft of 8,700 cubic feet per minute. The amount of coke consumed during the years under review ranged from approximately 6,800 to 9,100 tons annually. The amount of metal, including pig iron and scrap iron, charged into the cupolas ranged from 36,000 tons to approximately 50,000 tons. An average of about 3,700 gallons a day of bunker sea oil is consumed in the forge-shop and large quantities of fuel oil are likewise consumed in the foundry.

The plaintiff's claim may be considered in four aspects—(1) gaseous fumes accompanied by soot, fly ash and iron oxide are driven off in the operation of the cupolas and, in combination with oil fumes from the foundry and forge-shop, drift across the plaintiff's property when the wind is in a southwesterly direction and settle on the glass of his greenhouses, forming a tenacious coating interfering with the passage of light rays through the

glass with a detrimental effect on the growth and development of the plants; (2) the combination of fumes and organic substances causes a similar coating to form on the foliage of the plants, affecting their growth and saleability; (3) the fumes contain sulphur dioxide (which I shall hereafter refer to as  $\text{SO}_2$ ) in such quantities that the growth of the plants is affected and on several occasions the vegetation on the plaintiff's property has been subjected to what is known as " $\text{SO}_2$  blight"; (4) the operation of the hammers, and particularly the 5,000-pound hammer in the forge-shop, causes such vibration as to affect detrimentally the growth of orchids in which the plaintiff has specialized for many years, and has to some extent caused cracking of glass, and injury to the plaster in a house situated on the plaintiff's property.

Any one of these complaints, if established in evidence, would be sufficient ground for relief, providing material injury to the plaintiff's property has been shown. They are in a sense related, but they are in no sense interdependent.

Until the new cupolas were installed the plaintiff says his flowers were healthy and that while there was some small annoyance from smoke there was nothing that would not brush off without difficulty. His evidence is, and I accept it, that after the cupolas went into full production and the defendant started to use the fuel oil and bunker oil in the foundry, fumes from the forge-shop and foundry, together with organic substances from the cupolas, came over his property and he noticed that his plants were not showing the same growth. In 1940 the trouble appeared to abate somewhat but in 1941 it got worse.

The evidence shows that the predominant wind in this area is from the southwest. The following is the record given by a representative of the meteorological department of the Dominion Government resident in the area:

The wind blew from the southwest, in 1946, 174 days; in 1947, 182 days; in 1948, 192 days.

On 24th November 1941, the plaintiff wrote a letter to the defendant (ex. 5) which he commenced with the words "With regards to smoke-oil smudge and refuse from your plant causing damage to our production at the greenhouses", and referring to a conversation of ten days before, he stated: "We thank you for the prompt attention in sending your Engineer Mr. Edwards over, but to date we have not heard either from him or yourself.

He will recall the condition of some of the stock in our greenhouses. On inspection this week we find that we are again filled up with coke-breeze, and other dirt, and must ask that immediate attention be given to remedy this." He stated that through this nuisance he had lost over 60 per cent. production in the upper house, which should be added to the loss outside and diminished production throughout the greenhouses. He concluded: "But we will take this loss up direct with you after the remedy has been found. In the meantime this loss keeps piling up. Your urgent attention is requested." To this letter the defendant replied on 26th November (ex. 6), stating as follows:

"Since you spoke to the writer concerning it, the matter has been having our best attention. You will appreciate that it is essential that we first determine whether or not the damage of which you complain is actually the result of our operations.

"We will require probably an additional week or ten days within which to complete our preliminary investigation and you may be assured that, as soon as this has been done, we will be in communication with you."

On 6th January 1942 the plaintiff wrote again to defendant (ex. 7) giving an itemized statement of losses said to have been sustained "through the smoke oil smudge, and coke nuisance" coming from the defendant's plant. This was said to amount to \$1,228.50 for the past year. The letter concludes: "Undoubtedly this does not cover all, and we are not sure to what extent this has been remedied by yourselves as shortly we will have to open vents to air flowers. It is when this is done that a great deal of the damage occurs with the coke breeze etc. coming right down on the flowers."

Following this, two written agreements were entered into, both dated the 2nd January 1942 (exhibits 8 and 9). Both of these documents provide that in executing them the defendant is not to be taken as admitting any liability and they are no evidence of an admission of liability. They were admitted in evidence in view of the fact that the defendant had pleaded prescriptive right and acquiescence and they are evidence to show that the plaintiff had not acquiesced in the emission of fumes of this character over his property as pleaded in the statement of defence. On the other hand, they are also evidence that the plaintiff was vigorously pressing his claim for redress.



The agreements consisted of a release by the plaintiff, in consideration of the sum of \$1,225, of all claims against the defendant for injuries sustained by reason of any cause or matter or thing whatsoever existing up to the date of the agreement "and without limiting the generality of the foregoing particularly by reason of the emission from and discharge over, along and upon any of the premises and/or property of the said William Wallace Walker of any smoke, oil smudge, ash, gasses and other substances whatsoever and/or by reason of any nuisance or alleged nuisance to the said William Wallace Walker his lands, premises, chattels and effects occasioned or claimed to have been occasioned by the operations of the said The McKinnon Industries Limited"; and an agreement to pay the sum of \$600 per annum for an easement for the years 1942, 1943, and 1944, "to emit and discharge over, along and upon the lands hereinafter described, smoke of whatsoever nature and kind and the constituent parts and ingredients thereof, oil smudge, gasses, ash, vapors and noxious fumes, without any let or hindrance whatsoever and to do and create over, along and upon the said lands and premises for the purposes of the manufacturing operations of the said McKinnon, such other acts which, but for the existence of this agreement, might be deemed to constitute a nuisance thereon in respect of the occupation and use thereof".

The term of the licence granted under the latter agreement having expired on 31st December 1944, Mr. Schiller, the plaintiff's solicitor, after a meeting with Mr. Cook, the general manager of the defendant, wrote to the defendant on 7th September 1945, advising that the plaintiff intended to issue a writ for damages and an injunction. The letter goes on:

"We could not effectively claim an injunction during the war period, but now that the war is over there is no reason why we could not get an injunction.

"We regret the fact very much, and this letter is written for that purpose, that although we have co-operated to every extent with you, you did not co-operate in the last week when it was arranged that your Mr. Cook and your counsel would meet either at our office or at your office to inspect some photographs we have showing the damage done, in fact we had no word from your office whatever."

No action having been taken by the defendant following this letter, this action was commenced on 19th March 1946.

[His Lordship proceeded to review in detail the evidence as to the defendant's operations and the efforts made by it to lessen the emission of substances from the cupolas. He found as a fact that a deposit, containing a very high percentage of iron oxide, was formed on the glass of the plaintiff's greenhouses, shutting off a part of the sun's rays, all parts of which, according to the evidence, were important to plant life. He further found that when the ventilators of the greenhouses were open the same oily substance settled on the leaves and flowers of the plants, injuring the blooms and interfering with photosynthesis. He also found that considerable quantities of  $\text{SO}_2$  gas were given off in the cupolas, proceeding as follows:]

All witnesses agree that there are at least two types of injury to plant life that has been subject to fumigation by  $\text{SO}_2$  gas: acute injury and chronic injury. Some authorities consider that there is a third, known as invisible injury. This is disputed and for the purposes of this case it may be left out of consideration. Even if such injury did exist I would have grave doubts, on the authority of the judgment of Sir George Jessel in *Salvin v. North Brancepeth Coal Company* (1874), L.R. 9 Ch. 705, if it alone would give rise to a cause of action. I think on the evidence the progress of invisible injury would be so slow as to make proof of damage extremely difficult.

Acute injury is that caused by a fumigation of the gas in such concentration and duration as would cause markings on the foliage which are visible to the eye. Chronic injury is that caused by plants being repeatedly subjected to low concentrations of the gas, with the result that growth and development are retarded and in some cases their flowering is interfered with. That chronic injury can be serious is not forcibly contested, and little or no evidence was adduced by the defence which dealt with this aspect of the case. The evidence offered by the defence was directed almost exclusively to showing that vegetation in the area suffered no acute  $\text{SO}_2$  injury.

[After reviewing in detail the evidence on this issue, his Lordship proceeded:]

Considering the whole evidence, and I must not be taken to have referred to all the evidence that has affected my mind, I am thoroughly convinced that certain plants on the plaintiff's property and in the area were, during the years

1946, 1947 and 1948, subjected to acute injury by SO<sub>2</sub> gas emanating from the defendant's works and I so find as a fact.

The evidence also convinces me that the plaintiff's plants were subjected to chronic SO<sub>2</sub> injury by gas emanating from the same source. Dr. Duff described how conifers suffer chronic injury from SO<sub>2</sub> gas in the ordinary atmosphere of a city. There is no doubt that the defendant was adding substantial concentrations of SO<sub>2</sub> to the normal atmosphere in that area. As I have already indicated, it is difficult to disassociate the result of the SO<sub>2</sub> injury from injury resulting from the deposit of iron oxide and other organic matter from the smoke and fumes issuing from the defendant's works. For the purpose of this case, in view of the findings that I have made, I do not feel that it is necessary to do so. Together they account for the deterioration in the plaintiff's plants and do him material injury.

There remains to be considered the claim that the operation of the forge-shop caused vibrations which affected the growth of the plaintiff's orchids, in some cases broke the glass in the greenhouse, and caused plaster to fall in a house erected on the plaintiff's property. There is some evidence that a 5,000-pound hammer caused some vibration on the plaintiff's property, but that it caused the glass to break or the plaster to fall was not established to my satisfaction, nor was it established that the plants suffered any material injury. I feel that the inferences I would be called upon to draw to give effect to this contention are much too speculative to form the basis of a judgment. On the argument counsel for the plaintiff frankly agreed with this view and stated to the Court that he was not pressing any case based on a nuisance due to vibration.

The law to be applied to these findings of fact has been discussed at great length in numerous cases and by many textbook writers, and I do not feel that I can accomplish any good purpose by a discussion of it, other than to make some reference to the legal considerations that have guided me in coming to a decision.

An actionable nuisance cannot be defined with exactitude. In Blackstone's Commentaries, Book III, c. 13, p. 216, an attempt is made to define a private nuisance as "anything done to the hurt or annoyance of the lands, tenements or heredita-



ments of another". This definition is of value only to form a starting-point for the consideration of the law. It is too broad to be otherwise useful and would include many things that are not actionable. Each case must necessarily depend upon the facts of the case, but in coming to a conclusion whether the facts of a particular case establish an actionable nuisance there are some very well-defined principles to guide the judicial mind.

The first is that in the approach to the facts there is a difference between an action brought for nuisance upon the ground that the alleged nuisance produces material injury to property and an action brought for a nuisance on the ground that it is alleged to produce a sensible personal discomfort.

In *St. Helen's Smelting Company v. Tipping* (1865), 11 H.L. Cas. 642, 11 E.R. 1483, Lord Westbury L.C., at p. 650, states: "With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs." After pointing out that if a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which are necessary for trade and commerce and for the enjoyment of property by the inhabitants, he goes on to state: "... when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

The problem for the Court is to determine the limits of the rights of the respective parties in each case. Lord Wensleydale at p. 652 delineated the task of the Court in simple language of great clarity: "Every thing must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible incon-

veniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected."

In *Fleming et al. v. Hislop et al.* (1886), 11 App. Cas. 686 at 696, Lord FitzGerald, in dealing with a case based on a nuisance which interfered with the comfort and enjoyment of property, states that there is this restraint imposed on the right of a proprietor to the free and absolute use of his property for the protection of his neighbour: "... he is not so to use his property as to create that discomfort or annoyance to his neighbour which interferes with his legitimate enjoyment."

Lord Bramwell at p. 694 said: "The word 'material' is one used continually in endeavouring to explain to a jury what it is which would constitute a nuisance as distinguished from something which might, indeed, be perceptible, but not of such a substantial character as to justify the interference of the Court or allow the maintenance of an action; in conformity with the legal maxim, 'Lex non favet delicatorum votis.' It appears to me to be a right finding."

Lord Halsbury at p. 697 makes this general statement: "My Lords, it seems to me to be established clearly and beyond all doubt by a current of authorities, and to have been expressed with a degree of precision and logic in the judgment in *Bamford v. Turnley* [*infra*]; at p. 82, by my noble and learned friend on my right (Lord Bramwell), that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction".

*Bamford v. Turnley* (1860), 3 B. & S. 62, 122 E.R. 25, deals not only with what may constitute a nuisance but also with the contention that if what is done may interfere with the plaintiff's enjoyment of his property so as to constitute a nuisance, the trial judge may not take into consideration the question as to whether the defendant was making a reasonable use of his land. At p. 77 Williams J. states: "If it be good law, that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But if it is not good law, and if the true doctrine is, that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will

lie, whatever the locality may be, then surely the jury cannot properly be asked whether the causing of the nuisance was a reasonable use of the land." At p. 85, Baron Bramwell in cogent language disposes of any argument that "the public benefit" of the works complained of may be taken into consideration.

In *Rushmer v. Polsue & Alfieri, Limited*, [1906] 1 Ch. 234 at 245, Vaughan Williams L.J., referring to *St. Helen's Smelting Company v. Tipping*, *supra*, distinguishes the case then under consideration from one where the nuisance produces material injury to property.

Where the action is founded on injury to property, some guide in determining what character of injury is actionable is found by an examination of the judgment of Sir George Jessel M.R. in *Salvin v. North Brancepeth Coal Company* (1874), L.R. 9 Ch. 705, reported in the footnote on p. 706, and his reference to the charge to the jury of Mellor J. in *St. Helen's Smelting Company v. Tipping*, *supra*. The learned Master of the Rolls quotes Mr. Justice Mellor as instructing the jury that in an action for nuisance to property arising from noxious vapours, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it, and says: "... all the circumstances, including those of time and locality, ought to be taken into consideration; and that, with respect to the latter, it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with." In considering this last statement of the law one must not lose sight of the observations made on appeal in the House of Lords to which I have already referred. The learned Master of the Rolls went on to say: "That ruling was upheld by the House of Lords, and I take it as having established, in the first place, that the injury must be visible, by which I understand visible to ordinary persons conversant with the subject-matter. I do not think that this condition is satisfied by getting a scientific man to say that, by the use of scientific appliances, microscopic or otherwise, he can state that there will be in future time an injury. I do not think that that would be sufficient."

At p. 709 of the report, James L.J., in discussing this language of the Master of the Rolls, said:



"When the Master of the Rolls said that the damage must be visible, it appears to me that he was quite right; and, as I understand the proposition, it amounts to this, that, although when you once establish the fact of actual substantial damage it is quite right and legitimate to have recourse to scientific evidence as to the causes of that damage, still if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purposes of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shewn by a plain witness to a plain common jurymen.

"The damage must also be substantial, and it must be, in my view, actual; that is to say, the Court has, in dealing with questions of this kind, no right to take into account contingent, prospective, or remote damage."

The learned Lord Justice then went on to illustrate what he meant, by referring to the imperceptible accretions to a river bank or to the seashore which, after a lapse of years, might become measurable and ascertainable.

Any detailed consideration of some of the language of this judgment in the light of the developments of modern science is not necessary in view of the facts as I have found them, except as it may have application to the suggestion of invisible SO<sub>2</sub> injury to which I have already referred.

In *Walter v. Selfe* (1851), 4 DeG. & Sm. 315, 64 E.R. 849, Knight Bruce V.C., in dealing with an action based on a claim for damage or annoyance to the plaintiffs from burning or causing to be burned bricks on the defendant's property, occasioning damage or annoyance or injury to the plaintiffs' property and growing plants, said at p. 322: "And both on principle and authority the important point next for decision may properly, I conceive, be thus put: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"

In *Crumph v. Lambert* (1867), L.R. 3 Eq. 409, Lord Romilly M.R., at p. 413, in very comprehensive language sums up the law applicable as follows: "The owner of one tenement cannot

cause or permit to pass over, or flow into, his neighbour's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighbouring tenement, or so as to injure his property. It is true that, by lapse of time, if the owner of the adjoining tenement, which, in case of light or water, is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbour; but until that time has elapsed, the owner of the adjoining or neighbouring tenement, whether he has or has not previously occupied it,—in other words, whether he comes to the nuisance or the nuisance comes to him,—retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water. And the doctrine suggested in *Hole v. Barlow*, 4 C.B.N.S. 334 [140 E.R. 1113], that the spot from whence the nuisance proceeded was a fit, proper, and convenient spot for carrying on the business which produced the nuisance, is no excuse for the act, and cannot be made available as a defence either at law or in equity."

Some evidence was adduced to show that others are polluting the air over the plaintiff's property. While there is no evidence on which I could find that the plaintiff suffered material injury from pollution by others than the defendant, even if others are in some degree polluting the air, that is no defence if the defendant contributes to the pollution so that the plaintiff is materially injured. It is no defence even if the act of the defendant would not amount to a nuisance were it not for others, acting independently of it, doing the same thing at the same time: Salmond on Torts, 10th ed. 1945, p. 229, citing *Lambton v. Mellish*; *Lambton v. Cox*, [1894] 3 Ch. 163, and *Sadler v. The Great Western Railway Company*, [1896] A.C. 450; see also *Thorpe v. Brumfitt* (1873), L.R. 8 Ch. 650, per Sir W. M. James L.J. at p. 656. Any further discussion of this aspect of the case is unnecessary in view of the fact that the defendant created a new condition in the area after 1937 by the erection of the cupolas and the reconstruction of the foundry and forge-

shop, with the result that the fumes from these respectively had a combined effect not formerly present.

The defendant pleaded that the plaintiff's claim, if any, was barred by the Statute of Limitations, and prescriptive right and acquiescence. The evidence in this case falls far short of justifying any finding of fact sufficient to establish any of these defences. On the argument counsel wisely abandoned these defences.

On the law and on the facts I find that the plaintiff is entitled to relief.

There remains to be discussed what form the relief should take. I had occasion to review the principles on which the Court acts in granting an injunction in cases of this sort in *McKie v. The K.V.P. Company Limited*, [1948] O.R. 398 at 416, [1948] 3 D.L.R. 201. This judgment was affirmed in the Court of Appeal in [1948] O.W.N. 812, [1949] 1 D.L.R. 39 with a slight variation in the terms of the injunction. In that case I followed the judgment of Lord Lindley in *Shelfer v. City of London Electric Lighting Company*; *Meux's Brewery Company v. The Same*, [1895] 1 Ch. 287 at 314 where he quoted from the judgment of Lord Kingsdown in *Imperial Gas Light and Coke Company v. Broadbent* (1859), 7 H.L. Cas. 600, 11 E.R. 239, as follows:

"The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

At p. 322 A. L. Smith L.J. said:

"Many Judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance. . . .

"In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction."



The only matter that has given me concern with this aspect of the case is the fact that in January 1942 the plaintiff entered into an agreement with the defendant whereby he accepted \$1,225 in full satisfaction of all claims and demands against the defendant up until that time for injuries sustained by reason of the alleged nuisance, and in consideration of the sum of \$600 per annum granted an easement to do the things here complained of until 31st December 1944. It is argued with force that by entering into these agreements the plaintiff acknowledged that his injuries could be properly compensated for by a money payment and therefore an injunction ought not to be granted. In reply to this counsel for the plaintiff stresses the evidence given to the effect that at this time the plaintiff was advised by his solicitor, Mr. Schiller, that in his opinion a Court would not grant an injunction against the defendant by reason of the fact that it was engaged in the manufacture, on a very large scale, of munitions of war, which were urgently needed, and that the Court would not exercise its discretionary jurisdiction to do anything that would interfere with full production of this character. My first view was that there was much weight in the argument presented on behalf of the defendant, but on further consideration I have concluded that when the plaintiff was advised by a competent solicitor, acting in good faith, that a Court under these circumstances would not grant an injunction, he could not have been expected to have insisted on that remedy at that time and ought not to be prejudiced in claiming his full rights now that his action is before the Court for determination. I therefore consider the case irrespective of these agreements.

On behalf of the plaintiff, evidence was given by Mr. Beaumont that if the proper controls were established the fumes from the cupolas would not be injurious; on the other hand, no evidence was given by the defendant that if fumes were being emitted from their works they were beyond their control. The cases well establish that economic considerations do not enter into the matter, and I am not called upon to weigh the economic disadvantages to the defendant. In my view this is a case where damages are inappropriate. It is impossible to find, with any degree of precision, what damage to his business the plaintiff suffers by reason of the injury to the plants. Some plants are more susceptible than others. He is restricted in the use of his property in the way that he wishes to use it by reason of the

fact that he is unable to grow certain plants with success. There is, in fact, no standard against which monetary loss can be measured.

An order will issue for an injunction restraining the defendant from discharging, or permitting to be discharged, from its works into the air, any substance, gas or matter so as to occasion damage to the plaintiff as the owner or occupier of the property mentioned in the pleadings, or injury or damage to the said property, until the further order of the Court. If the parties cannot work out the terms of the injunction I may be spoken to. I have substantially followed the wording in *Walter v. Selfe* (1851), 4 DeG. & Sm. 315, 64 E.R. 849. The operation of the injunction will be suspended until 1st November 1949, in order to give the defendant an opportunity to make such alteration in its plant as may be necessary to conform to this order.

An order will go referring the matter to the County Judge of the County of Lincoln to ascertain and assess the damages sustained by the plaintiff during the years 1945, 1946, 1947, 1948 and 1949 down to the date on which the injunction becomes effective. In the assessment of damages the County Judge will not take into consideration any claim for damage sustained by vibration or by so-called invisible injury to the plants as distinct from acute injury or chronic injury as heretofore discussed.

The plaintiff will have judgment for the amount of the damages so found and the costs of the action, including the costs of the reference.

*Judgment accordingly.*

*Solicitors for the plaintiff: Ross and Howard, St. Catharines.*

*Solicitors for the defendant: Bench, Keogh, Rogers & Grass, St. Catharines.*

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## [COURT OF APPEAL.]

**Marks v. The Imperial Life Assurance Company of Canada.**

*Insurance—Life—Preferred Beneficiaries—Borrowing on Policy—Wife Signing Borrowing Agreement under Mistake as to Nature of Document—Misrepresentation by Insured—Trust—Cheque Given by Insurer to Insured alone—Plea of non est factum—The Insurance Act, R.S.O. 1937, c. 256, ss. 151(2), 156(1), 163(1), (2), 165(1).*

W, the sole designated beneficiary in two policies of insurance on the life of her husband H, signed with him loan agreements on the policies. The insurer issued a cheque payable to H and W, and gave it to H, who deposited it (less a small amount retained by him) in a joint bank account, from which either H or W might alone withdraw funds. The loan agreements provided that if at any time the accumulated indebtedness on the policies exceeded their cash surrender value the policies should be deemed to be surrendered to the insurer. H was killed about 18 months later and when W claimed payment of the insurance moneys the insurer informed her that the policies had lapsed under the provisions of the agreements. W sued, and the trial judge found as a fact that she had signed the loan agreements in ignorance of their contents and as the result of a misrepresentation by H, and also that the cheque issued by the insurer had not been endorsed by W.

*Held*, W was entitled to judgment. There was evidence to support the trial judge's findings of fact, and they should not be disturbed. These findings entitled W to have the loan agreements treated as a nullity. She had never in fact applied for a loan, or agreed to any of the terms of the agreements. The result of the finding that she did not endorse the cheque was that no loan was made to W that was chargeable against her interest in the cash surrender value of the policies. The insurer had no warrant for placing the cheque in the hands of H alone, or for ignoring W in advancing the money. There was no evidence that W had given authority to the insurer to pay to H, or had authorized H to receive the money. The moneys standing to the credit of the policies in the insurer's hands were held by it in trust for W as the sole designated preferred beneficiary, and the delivery of the cheque to H was not a payment chargeable against her interest in the policies. *Black v. Hiebert* (1907), 38 S.C.R. 557; *McMullen v. Polley* (1887), 13 O.R. 299; *Parent v. O'Connor* (1922), 21 O.W.N. 386, applied. Although the loan agreements contained an acknowledgment of receipt of the money, no money was in fact advanced until two or three days after the signing of the agreements, and the acknowledgment would consequently not exclude evidence that the money was not in fact received. *Coppin v. Coppin* (1725), 2 P. Wms. 291; *Singer v. Goldhar* (1924), 55 O.L.R. 267, applied.

Judgment of McRuer C.J.H.C., *ante*, p. 49, affirmed.

AN APPEAL by the defendant from the judgment of McRuer C.J.H.C., *ante*, p. 49, [1949] 1 D.L.R. 613.

6th and 7th April 1949. The appeal was heard by ROBERTSON C.J.O. and HOPE and AYLESWORTH JJ.A.

*Wilfred Judson, K.C.* (J. W. Graham, with him), for the defendant, appellant: The trial judge was wrong in holding that the plea of *non est factum* was made out here—on the facts as found that plea is not available. The plaintiff knew that she was a preferred beneficiary under the policies, and that the documents she signed related to those policies. Her mind was on her



property interests, although the effect of the document was different from what she thought. *Howatson v. Webb*, [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1, and *Carlisle and Cumberland Banking Company v. Bragg*, [1911] 1 K.B. 489, are distinguishable on their facts. Further those decisions have been much criticized: see a note by Anson, 28 Law Quarterly Review, 1912, p. 190; Cheshire and Fifoot, *The Law of Contract*, 1946, pp. 158-163; Pollock on Contracts, 12th ed. 1946, pp. 376-7. Here the plaintiff had a legal relationship to the insurance company, and she purported to deal with the contracts, signing a document without reading it. Surely she owed a duty of care in so acting, and she cannot now say, in view of the legal relationship, that she was ignorant of the contents of the document she signed. She is estopped. As to the distinction between the facts of this case and a true case of *non est factum*, I refer to Anson on Contracts, 19th ed. 1945, p. 167; *Bradley v. Imperial Bank of Canada*, 58 O.L.R. 650 at 663-4, [1926] 3 D.L.R. 38; *Carlisle and Cumberland Banking Company v. Bragg*, *supra*, is not binding on this Court. It is not mentioned in *Lewis v. Dane* (1930), 38 O.W.N. 72. As to the history of the plea, I refer to *Rose v. Mahoney* (1915), 34 O.L.R. 238, 24 D.L.R. 326.

We do not question the finding that a trust of the insurance moneys was created in the plaintiff's favour, but we do not accept the finding that we were a trustee. She had a property interest, and we were perhaps her debtor; we must pay her, if the policy is still in force at death, but we do not administer a trust.

The trial judge was wrong in holding that the plaintiff received no consideration. The loan is a single one, and it is made to the borrowers, and clause 2 of the agreements creates a charge. The husband brought the executed agreements to our office, and got a cheque, payable to him and the plaintiff. She delivered the documents to the husband, and most of the proceeds of the cheque were deposited in a joint bank account, from which the money was shortly afterwards withdrawn by a series of cheques, some of which were signed by the plaintiff.

We also dispute the trial judge's findings of fact, as to the signatures. There is a vivid and detailed description of the signing of one document only, whereas there were undoubtedly two borrowing agreements signed by the wife. The plaintiff's memory is not entitled to the credit given to it by the trial judge. The

findings of fact are against all probability, and result from the application of the wrong test of credibility. The trial judge has found in effect that the husband committed a crime, and in such circumstances the degree of proof required is very high.

A. M. Ecclestone, for the plaintiff, respondent: The findings of fact are wholly consistent with the probabilities. The husband clearly wanted to keep the facts from his wife. The means of settlement under the policies were as he stated, and he did change them. Every document dealing with the insurance, with the exception of the loan agreements, was witnessed by a representative of the company. The plaintiff was clearly deceived as to the nature and character of the document, and the plea of *non est factum* is available to her: *Martin v. National Union Fire Insurance Company*, 19 Alta. L.R. 786, [1923] 3 W.W.R. 897, [1923] 4 D.L.R. 574, affirmed [1924] S.C.R. 348, [1924] 3 D.L.R. 1012; *Bagot v. Chapman*, [1907] 2 Ch. 222 at 227; *J. R. Watkins Company v. Minke*, [1928] S.C.R. 414, [1928] 3 D.L.R. 557; *Rose v. Mahoney* (1915), 34 O.L.R. 238, 24 D.L.R. 326; *Imperial Bank of Canada v. McLellan*, [1934] 1 W.W.R. 65 at 70, 72; *Minchau v. Busse*, [1940] 2 D.L.R. 282 at 294.

The plaintiff was dealing with the proceeds, as she thought, and not with the policies themselves. No case can be found where an estoppel has been held to arise from a duty alone. There must be shown both a duty and a breach thereof.

The trial judge was right in holding that no consideration passed for the release of our interest in the policies. The cheque was delivered to the husband, and he obtained the proceeds: *Anson, op. cit.*, p. 87. Consideration must be proved. [ROBERTSON C.J.O.: Is your case not rather that the plaintiff, being the borrower, got no money, and hence there is nothing that can be charged against her interest in the insurance moneys?]

As to the plaintiff's status, she is a preferred beneficiary with a vested interest. A trust is created by s. 165 of The Insurance Act, R.S.O. 1937, c. 256, and the importance of this provision is indicated in *Sims*, The Uniform Life Insurance Act in Canada, 1927. The trial judge found that the relationship was that of creator of the trust, trustee and *cestui que trust*; the insurance company stood in a fiduciary position between the other two, and had a duty to see that the beneficiary understood the transaction.

I rely also on *Turnbull & Co. v. Duval*, [1902] A.C. 429, and *Chaplin & Co. Limited v. Brammall*, [1908] 1 K.B. 233, cited by the trial judge. [AYLESWORTH J.A.: This was not a transaction for the benefit of the insurance company. Surely it is far-fetched to hold that the husband was its agent.]

*Wilfred Judson, K.C.*, in reply.

*Cur. adv. vult.*

16th June 1949. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the defendant in the action from the judgment pronounced by the Chief Justice of the High Court on the 22nd December 1948, after the trial of the action before him without a jury.

The respondent is the widow of the late William John Marks, and she sues as the preferred beneficiary named in two policies of life insurance, numbered 305089 and 310550, for the sum of \$2,500 each, upon the life of her late husband, William John Marks, issued by the appellant on the application of William John Marks. The appellant alleges that both policies had lapsed for non-payment of premiums prior to the death of the insured, which occurred on the 20th September 1947. By the judgment in appeal the respondent was awarded the sum of \$4,876.59, being the face amount of the two policies, less the sum of \$123.41 for unpaid premiums. The respondent was also awarded interest and costs of action.

The matter in issue between the parties turns upon the question of a loan of \$120, which the appellant alleges that it made to the respondent and her husband upon the two policies, \$65 being borrowed on the security of policy no. 305089 and \$55 upon the security of policy no. 310550. If these loans, with accrued interest, were properly chargeable against the respondent's interest in the policies, then the cash surrender value of the policies, which otherwise would have been sufficient to keep them alive until the date of the death of the insured, was exhausted before that event.

The respondent and William John Marks were married in December 1940. He was then 26 years of age. In January 1942 the husband took out the first insurance upon his life, with the appellant. Policies 305089 and 305090 were issued to him, each in the sum of \$2,500, his wife being named in the policies as sole



beneficiary. In June 1942 he took out another policy with appellant in the same amount, his wife again being named as sole beneficiary. This policy is no. 310550. Marks enlisted in the air force in 1943, and was not discharged until December 1945. Policy no. 305090 had lapsed in December 1942, but in January 1946 that policy was revived and a fourth policy, no. 359617, was issued by appellant to Marks in the sum of \$2,500, with respondent named as the sole beneficiary. In January 1946 Marks held four policies issued to him by appellant, all in good standing, each in the sum of \$2,500, and in each of them respondent was named as sole beneficiary. The policies were not, however, in identical terms so far as the manner of payment in the event of the death of the insured was concerned, and early in March 1946 the insured gave certain new directions in writing to the appellant, through its agent, one Hardy, as to the mode of settlement in the event of death of the insured. All this preceded the making of the alleged loans upon which appellant relies, and did not disturb respondent's relationship as the sole designated preferred beneficiary.

There is little direct evidence as to insured's financial position at any time, but it is probable that his available resources were not great. Respondent, in her evidence, says that his intention, on getting his discharge from the air force, was to qualify himself as a veterinary surgeon. Among the exhibits is a "Statement of Occupations" on a form of the appellant's signed by the insured, and dated 4th March 1946. This gives his occupation as "Student under Rehabilitation Plan for Veterinary". He was at this time in receipt of a monthly allowance from the Department of Veterans Affairs, the amount of which respondent does not know. To provide for the security of his wife and children by life insurance seems to have been one of his first efforts on his discharge. He had, at that date, his wife and two children to support, and a third child was expected and was born in or about August 1946. Whatever in January 1946 may have been his prospects or expectations, it is abundantly plain that before many months had elapsed Marks found that to carry all his \$10,000 insurance was beyond him, but that came after the loan.

The respondent knew that her husband carried life insurance by which she would benefit in the event of his death, and she understood that the amount was \$10,000, but the policies were

in his keeping and he did not discuss with her the problems about his insurance. He had told her in February or March 1946 that he was having a change made in the mode of settlement in the event of his death, and discussed that matter with her several times. Her signature was not required to the directions Marks gave the appellant in regard to the changes in the terms of settlement.

In April 1946 Marks obtained respondent's signature to two agreements, in which he and the respondent were named as parties of the second part, the appellant being the party of the first part. The two agreements are dated the 5th April 1946 and are identical in terms, but one agreement relates to policy no. 305089 and to a loan of \$65 on that policy, and the other agreement relates to policy no. 310550 and to a loan on that policy of \$55. The agreement in each case recites that the company "has this day made a loan to the Borrowers" of the amount mentioned in it, upon the security of the policy, the number of which is inserted. It provides for the payment of interest on the loan, and for interest on any interest overdue and unpaid. It is not necessary, for the present purpose, to set out any of the provisions of the agreements except clause 2, which is as follows:

"If on any date the accumulated indebtedness on the policy, together with interest on said indebtedness to such date, exceeds the cash surrender value of the policy, the said policy shall be deemed to be and shall be in fact, surrendered to the Company without any notice or act by either party thereto."

The loans to which these two agreements relate were not in fact made on the date of the agreements, as they recite. No money was advanced on the agreements until some days later. On the return of the signed agreements to the appellant it issued its cheque in the sum of \$120, payable to William J. Marks and Willa G. Marks and dated 9th April 1946.

The respondent admits her signature upon the agreements, but she says that she was misled as to their true character when she signed them. She says that her husband had previously discussed with her his intention to change the terms of payment of the insurance money in the event of his death, and that on this occasion he asked her to get a witness, that he needed her signature and a witness's signature on the paper to change the policy, reminding her of the discussions they had had on that

subject. He asked her to run upstairs and get Mrs. Morris, who occupied an apartment above them, as a witness. Respondent says that she got Mrs. Morris and that, believing she was signing a document for the purpose merely of changing the mode of settlement, and knowing nothing of any proposed loan on the policies, she signed the agreements without reading them, and Mrs. Morris signed as witness. She says that she only learned the true nature of what she had signed after her husband's death.

There is no direct evidence disclosing by whom or in what manner the loan agreements, signed and witnessed, were returned to the appellant. The evidence is that immediately after the agreements were signed Marks took them away with him, and the reasonable assumption is that Marks himself left them at appellant's branch office with which he always dealt. On receipt of the agreements appellant issued its cheque on 9th April 1946, for \$120. This cheque, payable to the order of William J. Marks and Willa G. Marks, was made out at the head office and was sent to the branch office and was there delivered to Marks. He deposited the cheque on 10th April, with the names of the payees "Willa G. Marks" and "William J. Marks" endorsed upon it, to the credit of an account carried in the names of himself and his wife in the savings department of the Bank of Nova Scotia, less \$20 paid in cash to Marks at the time of deposit and not credited in the bank account. This savings account was one upon which either Marks or his wife had the right to draw in his or her individual name. The respondent says that she did not endorse this cheque, and that she had no knowledge of it or of any loan made by the appellant on the security of the insurance, until after the death of her husband in September of the next year.

The purpose for which the insured Marks at this time required the money he borrowed was evidently to enable him to straighten up a number of small accounts he owed, before moving to Minett's Point, where they went to live soon afterward. The cheques by which the money borrowed was withdrawn from the bank, and the account in the bank's records, show a number of small amounts drawn.

The account in the Bank of Nova Scotia had been opened while Marks was still in the air force. There was a credit balance of only \$5.15 in the account on 10th April 1946 before the deposit



of the cheque. By the 25th April the credit balance was reduced to 27 cents. The greater amount withdrawn in this period was withdrawn by cheques of the husband. Only five cheques, all of them bearing date 15th April, and aggregating \$27.24, were signed by the respondent, and she says that these cheques were all made out by her at her husband's request. A copy of the bank account is among the exhibits. The respondent says that her husband, after his discharge from the air force, looked after their money affairs. She had no recollection of using the joint bank account after his discharge from the air force, and although the appellant had an employee of the Bank of Nova Scotia produce its documents relating to the bank account, no cheques of the respondent subsequent to the deposit of the appellant's cheque of 10th April 1946 were among them, except the five cheques of 15th April already referred to.

A series of cheques of the husband, W. J. Marks, upon this account in the Bank of Nova Scotia were signed, payable to the appellant, at the time of the loan of \$120. Each cheque was for \$21, and all were post-dated, except the first of the series (ex. 20), which is dated 9th April 1946—the same date as appellant's \$120 cheque. The proceeds of this cheque were applied by appellant upon the premiums accruing on the policies. The post-dated cheques of the series were so dated that one would be payable as of the 9th of each succeeding month until January 1947. These cheques were made under arrangement with the agent, Mr. Hardy, whom I have already mentioned and through whom Marks had his dealings with appellant. Mr. Hardy turned the cheques into appellant's office. The premiums on all the policies, if spread evenly over twelve months, would amount to a little more than \$21 per month. The premiums upon two of the four policies were payable by monthly instalments. The premiums on the other two policies were payable quarterly, but in different months on the two policies. The series of cheques, all in the same amount, were intended to spread the burden of the premiums equally over the year. The first of these cheques (ex. 20) was paid on presentment and is the first charge made against the joint bank account after the deposit of appellant's \$120 cheque. No cheque for either May or June is among the exhibits, but the bank account shows a debit of \$21 soon after the middle of each of these two months, and it will be observed that the date of

each cheque produced, of later date than the April cheque, is altered from the 9th to the 17th of the month. The July cheque was not paid when presented, as there were not sufficient funds in the account. In fact after the payment of \$21 out of the bank account in June there was never a larger credit balance than \$3.18 in the account. None of the cheques of later date than July was presented for payment, and there was no further payment on account of premiums. The facts with respect to the giving of this series of cheques are mainly to be found in the evidence of Mr. Hardy, supplemented by an inspection of the cheques and the bank account. The making of the cheques and the payment of the first three of them would seem to indicate that when he obtained the loan on the insurance in April and gave appellant these cheques, and later when he paid several of them, Marks had still an expectation of being able to continue to carry insurance in the sum of \$10,000 for the protection of his wife and children.

The insured was killed in an accident on the 20th September 1947. Shortly after the issue of appellant's cheque of 9th April 1946 the insured, with his family, had moved to Minett's Point on Lake Simcoe, near Barrie, and that was their place of residence at the time of his death. The insured had the policies in his possession, and shortly after his death the respondent, having found the policies in his desk, had them taken by a friend to the office of appellant's agent at Barrie. Not hearing anything from the appellant the respondent went into Barrie about a week later, to inquire from the agent about the policies. The agent told her that there was a loan on the policies. She replied that there could not be, that she did not know anything about it. The agent promised to get further information, and later went out to see respondent at Minett's Point. He had with him photostat copies of the cheque of 9th April 1946 for \$120, and of the loan agreement, and he exhibited these to the respondent. According to her own account she told him that she could not understand it, that she had no recollection of it at all, but that the signature on the agreement looked like hers. She says that she further told the agent that she was in a very confused state of mind and could not remember it. The agent, who was called as a witness by the appellant, says that respondent admitted that the signature

endorsed on the cheque, as well as the signature on the agreement, was hers.

The disputed questions of fact that require to be determined in this action are concerned with the loans that the appellant claims to have made to the insured and the respondent on the two policies upon which the action is brought. Neither the loans nor the interest that accrued upon them was paid, and the appellant charged the amount of each loan, with accrued interest, against the amount standing to the credit of the respective policies as their cash surrender value. Amounts accruing due on account of premium and not paid were also charged to the same account. In the result the amount to the credit of the policy in each case became exhausted in the lifetime of the insured. The accrued indebtedness on the policy in each case, together with interest thereon, exceeded the cash surrender value of the policy. Clause 2 of the loan agreements, which I have already quoted, thereupon came into operation, and the policies were deemed to be surrendered without any notice or act by either party. All of this depended, however, upon appellant's right, as against the respondent, to charge the amount of the loan on the respective policies, with accrued interest thereon, against the cash surrender value. Without these charges there was enough to the credit of each policy to keep the policy in force until the death of the insured. This is the evidence of an officer of the appellant called as a witness for respondent.

The learned trial judge accepted respondent's evidence as to what had occurred in connection with her signing the two loan agreements. He also accepted respondent's evidence in regard to appellant's cheque of 9th April 1946 for \$120. He found that she had not endorsed her signature upon it, nor authorized its endorsement, nor had she received any of the proceeds.

On the basis of his findings of fact the learned Chief Justice held that a plea of *non est factum* was made good, and that so far as the respondent is concerned the loan agreements are void. With respect to the alleged loan of \$120 on the security of the two policies, he held that in view of the nature of respondent's interest in the policy under s. 156 of The Insurance Act, R.S.O. 1937, c. 256, the sum of \$120 and interest thereon was not properly chargeable against the cash surrender value of the policies



in question, and, therefore, their validity was not affected, and the respondent was entitled to recover.

On this appeal the findings of fact of the learned Chief Justice are attacked, and also his conclusions based thereon. It is submitted that the plea of *non est factum* has no application; that the respondent had constituted the insured her agent for the purpose of the loan transaction; that the appellant was not a trustee for respondent in the loan transaction; and that the proceeds of appellant's cheque went into a joint bank account, from which respondent participated in withdrawing them.

It will be well to see first what the interest of the respondent in the policies was. Under s. 151(2) of The Insurance Act she was of the class of preferred beneficiaries. In the policies as issued she was designated as the sole beneficiary, and came within the provisions of s. 156(1), which is as follows:

"Where the insured, in pursuance of the provisions of section 153, designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured."

It will be noted that the prohibition placed by this subsection upon control of the insurance money by the insured is not absolute, but only "except as otherwise provided in this Act". Some of the other provisions of the Act are of importance here. Section 163 deals with the insured's right to surrender the contract or to borrow on it, as follows:

"(1) Where a preferred beneficiary is designated, the insured may surrender the contract to the insurer and accept in lieu thereof any paid up or extended insurance provided by the contract in favour of the preferred beneficiary.

"(2) Where a preferred beneficiary is designated, the insured may, from time to time, borrow from the insurer on the security of the contract, such sums as may be necessary and are applied to keep it in force, and the sums so borrowed, with such interest as may be agreed on, shall be a first charge on the contract and the insurance money."

Then, s. 165(1) provides for the designated preferred beneficiary and the insured, acting together, surrendering the contract or assigning or disposing of it, either absolutely or by way of security, to the insurer, the insured or any other person, but expressly preserves the borrowing powers of the insured (under s. 163) without the concurrence of any beneficiary.

It would seem that the insured and the appellant were assuming to act on the authority of s. 165(1) in making a loan of \$120 upon the policies in question, although to the extent that the proceeds of that cheque, when deposited, went to pay insured's cheque of 9th April for \$21 on account of premiums on these two policies, it might be authorized under s. 163(2), even if borrowed by the insured alone. The result is not, I think, affected by that small amount.

Reading s. 163 and s. 165(1) together, and noting in particular the limited scope of the reservation of borrowing powers to the insured made by the concluding words of s. 165(1), I think it must be taken that the insured, acting alone, had no other powers of borrowing on the security of the contract than such as are given by s. 163(2). The respondent was a necessary party to any disposal of the insurance contracts, either absolutely or by way of security, except as provided in s. 163.

There is no doubt that respondent signed the loan agreements. She admits it. The question is, was the learned Chief Justice right in accepting her account of the manner in which her signature was obtained? No witness contradicts her evidence upon that matter, but it is said her story is incredible; that her husband was known to her to be an honest man; that only in January, having these two policies in good standing, he had revived another, and had secured a fourth, thereby doubling the amount of his insurance and doubling the amount required to carry it; that in March he had rearranged, for the advantage of the respondent, the provisions of the insurance contracts in regard to settlement on maturity, after discussing the matter with the respondent on more than one occasion—and why so much contriving to conceal a small loan?

There are, however, other circumstances that may have had their part in determining the insured's conduct. In the first place, respondent's health was not good. She was expecting a baby, and had had a short time before, as an incident of her con-

dition, severe and persistent attacks of vomiting over a period of about three weeks, during which Mrs. Morris had attended her. The insured obviously had no intention at this time of abandoning or forfeiting the insurance he had so recently arranged; on completing the loan he gave to the appellant's agent a series of cheques falling due one in each month, and intended to cover the premiums up to the following January. He may have thought it a considerate thing to do, to keep his wife in ignorance of his expedient to meet his bills before changing their place of residence. The loan was not so large that he might not, without undue optimism, expect to carry on until he could pay it off. There is nothing whatever to suggest that there was any ground for expecting at the time of the loan that his death was to happen so soon. He must have seemed a good risk in the preceding January when the policy that had lapsed was then revived. His death in September 1947 was caused in an accident. The husband was looking after their financial affairs at the time and he may well have thought it wise, in view of his wife's condition, not to disturb her in regard to any impairment in the security he had provided for her. From the insured's point of view at the time, the loan would assume none of the vital importance that it now has. It does not seem to me improbable that the insured, with no sinister intentions, thought he was justified in taking some care that his wife, in the circumstances, should remain in ignorance of the loan he was obtaining on the policy.

Of more importance in my opinion is the fact that the trial judge, who heard and saw the respondent give her evidence, found her to be a truthful and dependable witness. Her evidence on the matter of the signing of the agreements was corroborated by Mrs. Morris, an independent witness, to whom also the trial judge gave credit. I see nothing that would warrant this Court in reversing the findings of fact of the trial judge in respect to the signing of the loan agreements. I shall defer any consideration of their effect in law until I have dealt with the findings of fact in relation to the appellant's \$120 cheque.

The first observation to be made in that connection may seem an obvious one. The insured, having got his wife's signature to the loan agreements without disclosing what they were, is not likely to have then disclosed it all by asking her to endorse the



cheque. The evidence of witnesses, with respect to the endorsement of respondent's name on the cheque, comes from other sources so far as appellant's case is concerned. Mr. Robinson, appellant's agent at Barrie, says that respondent admitted her signature to him, both on the agreement and on the back of the cheque, on the occasion when he went to see her at Minett's Point with photostat copies of them. Mr. Farmer, an expert examiner of disputed documents, after comparing the signature endorsed on the cheque with numerous admitted signatures of the respondent, gave it as his opinion that the respondent endorsed the cheque. The respondent swore that she did not endorse the cheque and did not see it or know of the existence of the cheque until informed of it by Mr. Robinson on the occasion of his call upon her at Minett's Point after the death of the insured.

The learned Chief Justice did not accept the evidence of Mr. Robinson as to respondent's admission of the signature on the back of the cheque. In any case an admission made under the circumstances is not as cogent evidence against the respondent as it might have been if made in other circumstances. She had had no adequate opportunity to consider the situation, and she says she was confused. She says that what she did say was that the signatures looked like hers, but that she had no knowledge of them. This may have been taken by Mr. Robinson as an admission that the signature was hers. Several of his answers, particularly on cross-examination, plainly show that he had no accurate memory of the exact words used in the conversation, and anything short of a straight denial may have seemed to him an admission.

As to Mr. Farmer's evidence, he, of course, gives only an opinion, and he concedes that no one would rule out the possibility that an opinion may be wrong. He further concedes that there were difficulties in arriving at a positive conclusion, and at one time he considered the possibility that both names endorsed on the cheque were in the handwriting of the respondent. An inspection of the deposit slip finally satisfied him that the husband had made the deposit, and removed any doubt he had had that the husband's name was endorsed on the cheque in his own handwriting. He still seems to have entertained the opinion, even at the trial, that the capital "W" in the husband's signature was written by the respondent, and the rest of the signature by the

husband himself. Mr. Farmer got into trouble with the trial judge by offering his opinion as to the way in which it might have happened that the respondent did write the first letter of her husband's name. That was a matter quite outside the subject in which he is an expert entitled to give opinion evidence, and this was not the only instance in the course of his evidence where Mr. Farmer buttressed the opinion he put forward, based on an examination of handwriting, by his view of what might have happened to account for any difficulties, even where he had no evidence of what really had happened. This sort of thing may be some explanation of the not uncommon occurrence of two experts in handwriting, of equal skill and experience, putting forward in the witness-box diametrically opposite views in regard to the writing in question. It is also a legitimate reason for not placing too much reliance on such expert opinion.

I have no doubt Mr. Farmer did all that can be done by an expert in a case where there are numerous similarities in the ordinary handwriting of the two persons whose handwriting is under consideration. There are also frequent variations in the handwriting of both, at times departing from what might be considered characteristic and approximating what strongly resembles the characteristic style of the other. The learned Chief Justice, who followed closely the examination and cross-examination of Mr. Farmer, and examined the numerous samples of the handwriting of both husband and wife as the witness dealt with them, was not convinced that he could safely accept Mr. Farmer's opinion in the face of respondent's denial. I am not disposed to disagree with him. I agree with the finding that respondent did not endorse the cheque.

A statement appears in the course of the evidence that it is not uncommon, when a cheque payable to two persons is to be deposited in their joint account, to accept, for the purpose of such deposit, the endorsement of both payees' names by one of them. This may not have amounted to evidence of the existence of such a custom, but it is common knowledge that the same strictness is not required in the endorsement when made for the purpose of deposit to the credit of the payee, as when a cheque is presented for payment. We have no evidence here from the employee of the Bank of Nova Scotia who received the cheque in question for deposit, to show what really happened.

While the circumstances attendant upon the signing of the loan agreements by the respondent, and the question as to who wrote her signature on the back of appellant's cheque, have been discussed separately, they are really closely linked together. Not only does a finding in favour of the respondent on the one question support her on the other, but in weighing their effect upon the appellant's defence, the case for the respondent is much strengthened if it is found that the respondent neither signed the loan agreement with knowledge of its character, nor endorsed the appellant's cheque for the amount of the alleged loan. If the respondent were right only as to the circumstances attending the signing of the loan agreements but were wrong as to the endorsement of the cheque, there would be no explanation whatever from her to account for her endorsing the cheque, and it might be difficult for her to escape full responsibility for the loan.

With a finding in her favour on both the issues of fact, in my opinion the respondent is entitled to have the loan agreements treated as a nullity, her execution of them having been procured by misrepresentation of their real nature. She never in fact applied for a loan, or agreed to any of the terms of the loan agreements. This aspect of the case is discussed by the learned Chief Justice in his judgment, and I refer to the cases cited by him. I also refer to Spencer Bower on Actionable Misrepresentation, 2nd ed. 1927, s. 257, at pp. 245-6.

In dealing with the result of his finding that the respondent did not endorse appellant's cheque, the learned Chief Justice disposed of it by saying that: "no consideration passed for the release of her interest in the policies of insurance." With respect, I think it should be put a little differently. No loan was made to the respondent which was chargeable against her interest in the cash surrender value of the policies. The appellant had no warrant for placing the cheque for its intended loan in the hands of the insured, notwithstanding that it was made payable to both husband and wife. Having, from the appellant, possession of the cheque the insured was then able to get the proceeds of it into his own hands, and to do with them as he liked. There is no evidence whatever to support a finding that the respondent had given any authority to the appellant to pay to the insured, or any authority to the insured to receive, money raised by loan upon the security of the policies. As the sole designated pre-



ferred beneficiary, the moneys standing to the credit of the policies in appellant's hands were held by it as trustee for her. The insured and the respondent acting together, under s. 165 of The Insurance Act, could dispose of the insurance contract by way of security to the insurer, but even if they had agreed to do so, the appellant had no right to ignore the respondent in advancing the money it proposed to lend on this security. The acknowledgment of the making of a loan in the agreements of 5th April 1946 is of no avail to the appellant, for the simple reason that it was fully within the knowledge of the appellant that no such loan had in fact been made at the date of the agreements, and the acknowledgment was not true. Such an acknowledgment will not exclude evidence that the money was in fact not received: *Coppin v. Coppin* (1725), 2 P. Wms. 291, 24 E.R. 735; *Singer v. Goldhar*, 55 O.L.R. 267, [1924] 2 D.L.R. 141. The loan agreements upon which the appellant relies provide, according to their terms, for a loan to the designated beneficiary and the insured, and not to the insured alone. There was neither express nor implied authority in the insured to receive the loan, and the delivery to him of a cheque which enabled him to obtain its proceeds was not a payment chargeable by the appellant against the policy: *Black v. Hiebert* (1907), 38 S.C.R. 557; *McMullen v. Polley* (1887), 13 O.R. 299; *Parent v. O'Connor* (1922), 21 O.W.N. 386.

In my opinion the judgment of the Chief Justice of the High Court should be affirmed, and the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, respondent: Shuyler & Ecclestone, Toronto.*

*Solicitors for the defendant, appellant: Daly, Thistle, Judson & McTaggart, Toronto.*

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[LEBEL J.]

**Barnard v. Prudential Insurance Company of America.**

*Evidence—Burden of Proof—Allegation of Suicide—Degree of Proof Required—Necessity for Excluding all Other Reasonable Hypotheses.*

*Insurance—Life—Suicide Clause—Burden of Proof on Insurer Alleging Suicide—Insufficiency of Evidence Consistent with Suicide, but not Inconsistent with Accident.*

It is not enough for an insurer who sets up suicide as a defence to an action to establish circumstances that are consistent with that manner of death. The facts must be such as to be inconsistent with any other rational conclusion, and must point to the practical impossibility of the death having been accidental. *The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company, Limited*, [1929] S.C.R. 117; *New York Life Insurance Company v. Schlitt*, [1945] S.C.R. 289; *Dominion Trust Company v. New York Life Insurance Co.*, [1919] A.C. 254; *Harvey v. Ocean Accident and Guarantee Corporation*, [1905] 2 I.R. 1.

AN ACTION to recover under three policies of life insurance.

14th, 15th, 17th March 1949. The action was tried by LEBEL J. without a jury at Toronto.

*G. W. Ford, K.C.*, for the plaintiff.

*V. Evan Gray, K.C.*, for the defendant.

27th June 1949. LEBEL J.:—The plaintiff is the beneficiary under three insurance policies issued by the defendant upon the life of his wife Constance L. Barnard, who died as the result of gunshot wounds on the 25th October 1947.

Each of the policies contains a provision to the effect that if death is the result of bodily injuries "effected solely through external violent and accidental means" the defendant is to pay an additional benefit in a sum equal to the face amount of the policy, except where death results from self-destruction while sane or insane. The defendant has paid the plaintiff the face amount of each of the policies, but refuses to pay the additional benefits, relying upon the exception in the policies just adverted to, the substantial defence, and the only one argued, being that the late Mrs. Barnard committed suicide. That is the sole issue before me, because in the absence of evidence of foul play, and there is none, if the unfortunate lady's death did not result from a self-inflicted wound, it resulted from the accidental discharge of her gun.

Mrs. Barnard was 34 years of age at the date of her death. After her marriage to the plaintiff in 1936 the couple resided in

Toronto. Described as a most capable saleslady, Mrs. Barnard continued in her employment after her marriage until September 1937, when, as a result of illness, she was confined to hospital for about four months, first in the Toronto Psychiatric Hospital and afterwards in the Ontario Hospital at Whitby. After she recovered from her illness, she again worked for her former employer, Mrs. Irene Greisman, and until a week or a little more before her death she continued to work for her on a part-time basis. I gather that Mrs. Barnard preferred to be thus occupied, for it would seem that the plaintiff was always well able to support her.

About the middle of October 1947 the plaintiff returned to Toronto from a business trip to the Pacific coast. He had been away about a month. On Thursday, 23rd October, his wife asked him to take her to a cottage he owned on an island in Georgian Bay. He said that she was reasonably capable of handling firearms, and that she intimated that she would like to go duck-hunting. He agreed and the next day they left Toronto and proceeded to the island, where they spent the night. Saturday, 25th October, was a beautiful day, and after rising that morning the plaintiff and his wife spent about two hours in his boat in a vain attempt to locate the wild fowl. When they returned to the island Mrs. Barnard shot at some tin cans in the water for practice. Some time later she expressed the wish that they remain on the island until the following day. The plaintiff was agreeable, and set out in his boat to procure some coffee and to arrange for someone to come the next day for them in a boat somewhat larger than his own. He took that precaution lest the waters of the bay should become rough. The plaintiff said that his wife told him that she did not wish to accompany him and that she would prepare lunch while he was away. She was seated at a table inside the cottage the last time he saw her alive. When he returned to the island about noon, and after an absence of about one hour, he found her lying on her back upon the ground outside the cottage. Her shotgun lay 6 or 7 feet from her head. The plaintiff said that he saw that she was wounded in the chest near the left breast, and that the front of the cardigan sweater which she wore was saturated with blood. He decided not to move her, and did not touch the gun. Almost immediately he left the island to sum-



mon help, but it is plain that his wife was either dead or far beyond help at the time he made his gruesome find.

On reaching another island, the plaintiff reported what he had seen to a Mr. Robetaille and his wife, and they took him back to his island in their boat. Neither Robetaille nor his wife testified at the trial, and the plaintiff swore that he was too wrought-up to remember what he said to either of them. At all events, when the three arrived at the scene of the tragedy the plaintiff took no part in any investigation that Robetaille and his wife may have made. He swore that either Robetaille or his wife had taken a blanket from the cottage and thrown it over his wife's body, but that neither of them had touched the body or the gun. He said that he and the Robetailles were on the island about ten minutes altogether.

Robetaille then took the plaintiff to Penetanguishene, some 18 miles distant from the island by water, arriving there about 2 o'clock in the afternoon. The plaintiff reported what he knew to the local police, and he was told to go to an hotel and remain there until interviewed later. The local police then got in touch with Constable James L. Freeman of the Ontario Provincial Police, stationed at Elmvale. Constable Freeman proceeded to Penetanguishene, and after he had interviewed the local police he was taken to the island in the Robetaille boat. He and Robetaille and a photographer arrived there about 4 o'clock, and the constable immediately commenced his investigation. He swore that the gun on the ground was not broken open as the plaintiff said it was when he first saw it, and that the wooden forestock of the gun was detached and lying on the plank walk near the gun. It is possible, in view of the shock he must have received, that the plaintiff was mistaken about the barrel being broken open, but nothing appears to turn on the point. After completing his investigation Constable Freeman had Mrs. Barnard's remains conveyed in the same boat to Penetanguishene. He then telephoned Dr. Churchill S. Swan of Midland, the coroner, between 6.30 and 6.45 o'clock, according to Dr. Swan. The doctor proceeded at once to Penetanguishene and met Constable Freeman there. After the doctor looked at Mrs. Barnard's body in the boat, he and the constable went to the hotel and together interviewed the plaintiff for about 45 minutes. Dr. Swan then notified the Crown Attorney at Barrie, and ordered the removal of the body to an

undertaker's morgue in Midland. Later he and Constable Freeman attended there and examined the body and afterwards each man made the report he is required to make to the proper authorities. Both Dr. Swan and Constable Freeman reported the case to be one of suicide, but their opinions are, with respect, inadmissible since they deal with the very point the Court is now asked to determine: see *New York Life Insurance Company v. Schlitt*, [1945] S.C.R. 289 at 294-5, 12 I.L.R. 57, [1945] 2 D.L.R. 209. However, in reaching their conclusions both men attached importance to what they understood the plaintiff to say to them at the hotel, and since statements of that kind are not only admissible but important in considering the matter of the deceased's state of health and mind, I think I should deal with these statements now. Both men said that they questioned the plaintiff to determine whether there had been foul play, and Dr. Swan added he was also looking for a motive for suicide.

Dr. Swan related that the plaintiff told him that his wife had been a patient in a mental hospital in 1938, that for many years she had suffered from claustrophobia, which is, of course, a dread of closed places, but not a mental disease, and that a short time before her death she had consulted a physician, "a student of the stars or something". Dr. Swan also said that the plaintiff told him that the deceased was depressed at times, that she longed for children but had none, and that while he could not recall what the plaintiff actually said there had been an intimation from him that he had been afraid to leave her alone lest she do something to herself.

Constable Freeman testified that the plaintiff had said his wife had suffered a nervous breakdown about a year after their marriage, and had feared a recurrence of that illness; also that she worried about not bearing children; that she had wished to adopt children but had been afraid of what would become of them if anything happened to her. He added that the plaintiff had said that his wife had complained recently of pains at the top of her head; that she had expressed herself as feeling that the walls and ceiling were closing in on her; that on the morning of the tragedy she had remarked that she had not slept well during the night; and that later she had refused to eat the egg which she had cooked for her breakfast. Constable Freeman also told me that there was something said by the plaintiff from

which he gathered that the deceased had believed in signs from the stars, and had consulted a doctor in that connection. He did not say that the plaintiff had indicated that his wife was depressed at times, as Dr. Swan said, and in one other important respect he did not agree with Dr. Swan. He said that he was making notes when the plaintiff was interviewed, and that he was present during the whole time. He said if the plaintiff had indicated that he was apprehensive lest his wife do something to herself if left alone, he would have heard his statement to that effect and made a note of it. The plaintiff testified that he had never entertained such a fear, and denied that he had ever said so, or that his wife was ever depressed at times. He told me that he had no reason to think that she would commit suicide, and that he did not believe that she had done so. Constable Freeman said he distinctly recalled that what the plaintiff had said at the interview was that his wife never intimated that she would take her own life.

In these circumstances I do not believe that the plaintiff ever said that he feared his wife might harm herself if left alone. I am satisfied that Dr. Swan was mistaken. Both men told me, as one would expect, that the plaintiff was emotionally upset at the time they interviewed him. Undoubtedly the questioning was carried out fairly, but since it lasted about 45 minutes, it must have been rather exhaustive, and that being so, if the plaintiff said he entertained fear for the safety of his wife, one would think that he would have explained at some point in the interview why he was afraid she might take her own life. This he did not do. Much that the two men said the plaintiff professed not to remember when questioned at the trial, which is not surprising in view of his wrought-up condition at the time, but if it is assumed, as I am prepared to hold, that he said everything that Dr. Swan and Constable Freeman both attributed to him in the course of their testimony, I am quite unable to find a motive for suicide. Surely it cannot be reasonably inferred from any of these circumstances, or from all of them together, that this lady suddenly resolved upon self-destruction. I think that the inference is impossible to draw in view of what the plaintiff and the two ladies who knew her intimately said about her disposition and mode of life. They described her as always cheerful, and said her marital relations were most happy. They said she was always



interested in her husband, her home and her work. The only proper inference, in my opinion, is that she did not desire death or seek it. But in any event the presence or absence of a motive is not conclusive.

*In Dominion Trust Company v. New York Life Insurance Co.*, [1919] A.C. 254 at 258, 44 D.L.R. 12, [1918] 3 W.W.R. 850, Lord Dunedin said this about the approach to a consideration of the evidence in a case of alleged suicide:

"The evidence to be examined in such a case falls at once into two distinct divisions. There is the evidence which bears on the motive for such an act, and there is the evidence of the facts as to the method of death, which include all actions of the deceased antecedent to, and possibly leading up to, the catastrophe."

He added at p. 259: "Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death."

Before dealing with the circumstances of the death, I think I should review the evidence which has to do with the illness which befell Mrs. Barnard and required hospitalization in 1937-38. Since counsel for the defendant devoted considerable time to an endeavour to prove that Mrs. Barnard had been mentally ill, and since para. 11 of the statement of defence alleges that the death resulted from mental infirmity, I assumed that he intended to take that position, but he did not do so. He put the matter this way, and I quote from the transcript of his argument, which was kindly supplied to me:

"I want to dispose now immediately, very quickly, of what was said in evidence about the mental condition of the deceased. The defendant has not put forward that testimony with the intention of influencing your Lordship to believe that this event was predictable by any circumstances relating to her mental health. We do not regard it as proof of suicide and it is not in this record for that purpose. We believe there is no such thing as prognosis of suicide. . . . I do not ask this Court, nor any Court, to say from any testimony antecedent to death, as to the condition of a person's mind, either as motive or as mental infirmity, that suicide was a probable consequence. Only in

retrospect, at the end of the case, after the suicide has been demonstrated as the reasonable probability in the circumstances of the case, on evidence adduced, then you may look back and say: 'Well now, is there anything in the medical history or the circumstances which make this pattern of human behaviour intelligible and reasonable?' "

I am asked, therefore, to consider the state of the deceased's mental health only after I have concluded that suicide has been demonstrated as the reasonable probability in all the other circumstances. I must confess that I am unable to understand how a consideration of that kind would assist me. It would go merely to explain *a posteriori* why the suicide happened once it had been established, not to prove that the case was one of suicide by reason of mental infirmity. It seemed to me at the time that counsel had changed his position from the one taken in his pleading because he felt that it was impossible to ask the Court to conclude, in the circumstances of the case, that mental illness caused Mrs. Barnard to take her own life. The state of her mental health before, and perhaps for some long time before, her death is unquestionably an important circumstance which must be looked at with all the other circumstances of the case, but I am convinced that it is impossible to conclude, upon the evidence, that mental infirmity had anything whatever to do with her death.

In the first place there is no evidence, properly admissible, that Mrs. Barnard was ever mentally ill. The plaintiff told Dr. Swan and Constable Freeman, and his testimony on the point was corroborated by the latter, that his wife had had a nervous breakdown about a year after their marriage. He was asked on cross-examination whether he had not told Dr. Swan that she had suffered from depressive psychosis. He denied that he had, and explained that he could not have done so because he could not pronounce those words, and Dr. Swan did not say that the plaintiff mentioned that mental disease by name. The plaintiff was also asked other questions on cross-examination which should not properly have been asked, as it later developed. For instance he was asked and denied that he ever told Dr. Swan that his wife had moody spells, and that he thought she had taken a spell and shot herself. Dr. Swan did not testify that the plaintiff had said any such thing to him.

No doctor who testified had attended upon Mrs. Barnard at the time of her hospitalization or afterwards. Dr. H. E. Moorehouse and Dr. Mary V. Jackson were subpoenaed to produce, and did produce, some of their hospital records. The records themselves were not tendered as evidence, but they were said to show that certain other staff doctors in both hospitals had diagnosed her case in 1937 as one of manic depressive psychosis, manic phase. Wherever these doctors or other members of the two hospital staffs who made the entries in the records were, they were not present at the trial, and no one said that any one of them was deceased. Neither Dr. Moorehouse nor Dr. Jackson could say who made the different entries in the records at which they were looking. In my opinion hospital records or entries therein cannot be made evidence in that way. To do so would be to violate the hearsay evidence rule. Mr. Gray argued that they were admissible on the authority of *Palter Cap Co. Ltd. v. Great West Life Assurance Co.*, [1936] O.R. 341, 3 I.L.R. 285, 308, [1936] 2 D.L.R. 304, 327. In my opinion that case is no authority for that proposition. There the Court decided that a written report made by a deceased physician in the course of his duty was admissible under certain conditions, but that is a very different matter, in my opinion.

At all events, if one assumes for the sake of argument that Mrs. Barnard suffered from the mental disease just mentioned, and that the hospital records may be looked at to establish that fact and others, it is clear from these records that she never passed into the depressive phase of the disease, at least while in hospital. Dr. Moorehouse said that there is no fear of suicide except when a patient is either in that phase or recovering from it. Excited patients, he said, do not commit suicide. He also swore that the prognosis in her case was reported to be good, and that statistically the majority of patients suffering from the disease recover after one attack. His opinion was that if she ever passed into the depressive phase after she left the hospital, her husband and her friends would not have failed to notice it from her behaviour. The plaintiff swore that his wife had never exhibited any signs of depression. He said, on the contrary, that she was of a cheerful disposition. This is also what was said by the two ladies to whom I have already referred, namely, Mrs. Greisman, her employer, and



Mrs. Ilona Butler, a close friend of seven years' standing. These two ladies had never seen her in a moody spell, and they had seen and talked to her on numerous occasions over the years, the last time only a few days before her death. Accepting their testimony and the testimony of the plaintiff as to the behaviour of the deceased, as I do, I find, even if the hospital records were admissible, that the deceased never suffered from the depressive phase of the disease, and hence was never a potential suicidal person on that account. There is not a particle of evidence to suggest that she was ever mentally ill following her discharge from hospital in January 1938.

Dealing next, and briefly, with the matter of claustrophobia, which Dr. Moorehouse made it clear was not a mental disease, the subject was initiated in the interview the plaintiff had with Dr. Swan and Constable Freeman. No one suggested that that form of neurosis might evoke suicidal tendencies, but I think that the point should be cleared up. The plaintiff said in the course of his testimony that his wife had feared that their house would fall down because he had allowed a friend to store certain articles in an upper floor with the result that the ceiling had cracked. He felt that it was that incident he must have related at the interview at the hotel. He recalled that the word claustrophobia was used by Dr. Swan on that occasion, but said that he thought that it was a medical term for a nervous breakdown. He swore, having learned in a general way at the trial what claustrophobia was, that his wife had never exhibited any symptoms of that disorder and nothing of that kind was ever observed by Mrs. Greisman or Mrs. Butler over the years of their close association with her. In those circumstances, I am unable to find, on the strength of something the plaintiff told Dr. Swan and Constable Freeman while in a state of emotional upset, that the deceased ever suffered from claustrophobia.

I now propose to deal with the circumstances of the death. Constable Freeman, having ruled out foul play, seems to have concluded upon his first visit to the island that Mrs. Barnard committed suicide and the defence adopted the theory he formulated.

[His Lordship then reviewed particularly the evidence of Constable Freeman and Dr. Swan, together with other expert evidence called in support of the defence of suicide, and proceeded as follows:] I am willing to accept as proved the fact that in

all the circumstances the gun was discharged close to the deceased's body, but that would be so if she were carrying the gun with the barrel pointing upwards, or if she fell on or near it in such a way as to have touched the trigger.

My conclusion on the point, therefore, is that Constable Freeman's theory that the gun was discharged when its muzzle was pressed against the deceased's body, while she bent over in the position he described, has not been demonstrated by Dr. Lucas's experiments, or by the circumstances of the case.

If this is not a case of suicide it falls within the additional benefit clauses of the policies issued by the defendant, and the plaintiff has discharged the onus upon him to show that his wife died as a result of injuries effected solely through external violence and accidental means.

In *Harvey v. Ocean Accident and Guarantee Corporation*, [1905] 2 I.R. 1 at 29, it was said:

"If a man is found drowned, and certainly drowned either by accident or by suicide, and there is no preponderance of evidence as to which of the two caused his death, is there any presumption against suicide which will justify a jury or an arbitrator in finding that the death was accidental and innocent, and not suicidal and criminal? In my opinion there clearly is such a presumption."

I think this principle applies whether the person is found drowned or shot or overcome by insidious gas, and I am unable to appreciate Mr. Gray's argument that a distinction has to be drawn between shooting cases and others. It may well be that in shooting cases suicide is easier to prove because of the tell-tale evidence left by the weapon, the projectile and the position of the body and the marks upon it. In that respect there may be a distinction, but in this case none of these factors leads to a fair conclusion that there is a preponderance of evidence pointing to suicide. On the contrary, in my opinion, accident is the more probable inference in all the circumstances.

The authorities upon this branch of the law were recently reviewed in *New York Life Insurance Company v. Schlitt*, *supra*, and I do not think anything would be gained by quoting passages from it. In that case it was again held that suicide is a crime, and the rule laid down in *The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company, Limited*, [1929] S.C.R. 117, [1929] 1 D.L.R. 328, 51 C.C.C.

31, was again approved. In that case, in the Court of Appeal for this Province, *sub nom. Lang Shirt Co.'s Trustee v. London Life Insurance Co.*, 62 O.L.R. 83, [1928] 2 D.L.R. 449, Middleton J.A. at p. 93 laid down the rule in language which was afterwards adopted by the Supreme Court of Canada when the case was carried higher. He said:

“ . . . I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act but that the facts are such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed. See Alderson, B., in *Rex v. Hodge* (1838), 2 Lewin C.C. 227 [168 E.R. 1136].”

In my opinion the circumstances proved here are consistent with suicide, but not inconsistent with accidental death.

In *McCart et al. v. World Marine and General Insurance Co. Ltd.*; *McCart et al. v. Northern Assurance Co. Ltd.*, [1936] O.W.N. 413 at 417, 3 I.L.R. 549, Riddell J.A., after quoting the above rule, referred to the language of Lord Dunedin in *Dominion Trust Company v. New York Life Insurance Co.*, *supra*, at p. 260, where it was said:

“But the determining element in the case is the real evidence afforded by the wound, its position, and its relation to the clothes worn, by the presence of the stick, which all point to the practical impossibility of the injury being caused by any accidental handling of the gun, however clumsy.” (The italics are mine.)

In the present case Dr. Swan said it was impossible, in his opinion, to rule out accident. Constable Freeman told me that it was possible that the shot could have occurred the way he said it had, but he did not think it was the only way it could have happened. Dr. Lucas refused to say the shot could not have happened in any other way, but he thought another way was improbable. No one of these witnesses, therefore, went so far as to say that there was “practical impossibility of the injury being caused by any accidental handling of the gun, however clumsy”, to use the words of Lord Dunedin.

It is a well-known fact that people often shoot themselves accidentally, through carelessness. Some of these unfortunates are well versed in the handling of firearms. The plaintiff testi-



fied that there were snakes on the island which he and his wife had shot, and that refuse thrown in the water behind the cottage sometimes attracted wild fowl. It will also be remembered that he said that before he left the island his wife had been practising her aim by shooting tin cans in the water. It may well be that, as she proceeded down the steps, she had one of these objects in mind.

In the result the action succeeds, and there will be judgment for the plaintiff for \$1,700 and interest, as claimed. The plaintiff is entitled to be paid his costs forthwith after taxation.

*Judgment accordingly.*

*Solicitors for the plaintiff: Manley & Ford, Toronto.*

*Solicitor for the defendant: V. Evan Gray, Toronto.*

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[COURT OF APPEAL.]

**Rex v. Welch.**

*Criminal Law—Appeals—Powers of Court on Quashing Conviction—Conviction for Manslaughter, on Indictment for Murder, Quashed for Misdirection—New Trial not Ordered and Acquittal not Directed—Fresh Indictment Preferred for Manslaughter—The Criminal Code, R.S.C. 1927, c. 36, ss. 856, 909, 951(2), 1014(3).*

Under s. 1014(3) of The Criminal Code the Court of Appeal has a discretion, in allowing an appeal against a conviction, to set aside the conviction and to refrain from exercising its power to direct a judgment and verdict of acquittal, without ordering a new trial.

The appellant was indicted for murder, and was convicted of manslaughter. This conviction was set aside on appeal, on grounds of misdirection, and the Court neither ordered a new trial nor directed that a judgment and verdict of acquittal be entered, but expressly pointed out, in the reasons for judgment, that the appellant had not been acquitted of manslaughter. A new indictment, charging manslaughter only, was then preferred, and the accused pleaded *autrefois acquit*. The jury, substantially following the direction of the presiding judge, found against the accused on this plea, and the trial then proceeded to a conviction.

*Held*, this conviction should stand. There being neither an acquittal nor a valid conviction for manslaughter, there was nothing to prevent the preferring of the new indictment, and s. 909(2) of The Criminal Code did not apply to bar the prosecution.

AN APPEAL in writing from a conviction, before Schroeder J. and a jury, for manslaughter. The appellant had previously been indicted for murder and convicted of manslaughter, and that conviction was quashed on appeal: *Rex v. Welch*, [1948] O.R. 884, 92 C.C.C. 178, 6 C.R. 472.

2nd June 1949. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

*C. L. Dubin* (appointed by the Court), for the accused, appellant: The Court was right, on the last appeal, not to order a new trial. Since the accused had been acquitted on the only charge contained in that indictment, he clearly could not be tried again upon it: *Rex v. MacDonald*, [1943] O.R. 158, 79 C.C.C. 133, [1943] 2 D.L.R. 640; *Rex v. Antony*, [1943] O.W.N. 778, 80 C.C.C. 390, [1944] 1 D.L.R. 239. Although there was no express acquittal of murder, the verdict of the jury on the first trial necessarily implied such an acquittal, under s. 951(2). In *Gudmondson v. The King* (1933), 60 C.C.C. 332, a new trial was ordered, but apparently without any consideration of the Court's power to make such an order. In any event, that case is no authority for what was done here, as said by the trial judge, because here there was in fact no order for a new trial.

My submission is that after the conclusion of the first prosecution by the order of this Court the accused could not be tried again in the absence of a formal order for a new trial. There being no such order, he was entitled to go free either (1) on the maxim *nemo debet bis vexari pro una et eadem causa* (a common law defence preserved by s. 16 of The Criminal Code, R.S.C. 1927, c. 36); or, alternatively, (2) under the plea of *autrefois acquit* taken by him at the second trial, under s. 907; or (3) by the operation of s. 909(2). I deal with these three grounds in order:

1. In the absence of an order of the Court of Appeal, an accused who has once been tried, and whose case has been disposed of by a competent Court, cannot be tried a second time for the same offence. Until 1907 an accused person in England could be put on trial a second time either (i) on a *venire de novo*, ordered by a trial judge before verdict (e.g., in case of disagreement, defect in jurisdiction, irregularities during the trial) or by the Court of Error, or (b) under an order for a new trial by the Court of King's Bench. A *venire de novo* could be ordered only where the first trial was abortive, and not on grounds of misdirection, in which case the second of the above alternatives was available.

The Criminal Appeal Act, 1907, c. 23, abolished the right of the Court of King's Bench to order a new trial, and set up a

new Court of Criminal Appeal, to which it gave all the powers of the old Court of Error. Thus a *venire de novo* can now be ordered in the case of an abortive trial, but there is no power to order a new trial after a trial which has not been a nullity. The Court of Criminal Appeal has frequently lamented the fact that it has no power to order a new trial: see, e.g., *Rex v. Dyson* (1908), 1 Cr. App. R. 13; *Rex v. Stoddart* (1909), 2 Cr. App. R. 217. It is clear from these judgments that there cannot be a second trial without such an order, except where a *venire de novo* is issued on appropriate grounds, and it is clear that the writ must actually issue: *Crane v. Director of Public Prosecutions*, [1921] 2 A.C. 299.

A *venire de novo* was never granted for misdirection: Archbold, Criminal Pleading, Evidence and Practice, 31st ed. 1943, p. 325. Schroeder J. was clearly in error in holding that the first trial was abortive; it has always been held that a person has been in jeopardy if tried by a competent Court: Russell on Crimes and Misdemeanours, 8th ed. 1923, p. 1819 (vol. 2). It is still only where the first trial has been a nullity that a *venire de novo* can be ordered, and even then it is frequently refused, in the exercise of the Court's discretion: see, e.g., *Rex v. McDonnell* (1928), 20 Cr. App. R. 163; *Rex v. Gee, Bibby and Dunscombe* (1936), 25 Cr. App. R. 198; *Rex v. Wilde* (1933), 24 Cr. App. R. 98.

2. As to the plea of *autrefois acquit* generally, I refer to Archbold, *op. cit.*, pp. 135 *et seq.* It has been conceded throughout that the "matter" at the two trials was the same, and obviously the accused could have been, and in fact was, convicted of manslaughter on the first trial. The setting aside of a conviction on appeal, without more, is equivalent to an acquittal: *Rex v. Barron*, [1914] 2 K.B. 570, 10 Cr. App. R. 81. When this Court came to the conclusion that it must quash the conviction, and could not order a new trial, there was no jurisdiction to attach a condition and say that the order was not equivalent to an acquittal. In any case, there is no such provision in the formal order of the Court, but only in the reasons of the majority.

The trial judge relied on *Rex v. Burr* (1906), 13 O.L.R. 485, 12 C.C.C. 103, and *Hubin v. The King*, [1927] S.C.R. 442, 48 C.C.C. 172, [1927] 4 D.L.R. 760, but those cases deal only with the circumstances in which the Court will order a new trial, which was done in both cases. In the *Hubin* case the Court



expressly says that in order to permit the Crown to proceed again it will order a new trial.

3. There had been an acquittal of murder at the end of the trial, and only that jury could convict of manslaughter. By the time the matter came up at the second trial, all that stood was an acquittal of murder, which was a complete bar to the second prosecution under s. 909(2). *Rex v. Wilmot*, [1941] S.C.R. 53, 75 C.C.C. 161, [1941] 1 D.L.R. 689, is not an authority here, because of the special language of ss. 909(2) and 1023(2), as amended.

As to the danger of relaxing the strictness of the common law rules as to technical defences, I refer to *Maxwell v. Director of Public Prosecutions*, [1935] A.C. 309, 24 Cr. App. R. 152, 30 Cox C.C. 160.

*W. B. Common, K.C.*, for the Attorney-General, respondent: I deal with the appellant's points in order:

1. There is no such plea as "double jeopardy". The rule is merely a basis for a plea of *autrefois acquit* or *autrefois convict*. Section 905 expressly excludes all special pleas except *autrefois*.

2. By the very nature of this plea, the accused must establish a former acquittal upon the charge upon which he is now indicted. There is no such thing here. The order of this Court quashing the conviction must not be confused with the directing of a verdict of acquittal, which the Court has power to do under s. 1014(3). Where an acquittal is not directed, the Crown is entitled to proceed *de novo* under s. 873. *Rex v. Barron*, [1914] 2 K.B. 570, 10 Cr. App. R. 81, when the full report is read in [1914] 2 K.B., is not authority for the proposition that the quashing of a conviction is tantamount to an acquittal, although this proposition is extracted in the headnote in Cr. App. R. The Lord Chief Justice did make that statement, at p. 574, but it was wholly *obiter*, and not necessary for the decision. In that case, a judgment or verdict of acquittal was in fact entered on the order of the Court of Criminal Appeal, but here not only was that not done, but the Court expressly pointed out that the appellant had not been acquitted. In any case, s. 1014(3) is differently worded from the corresponding English provision.

3. Section 909(2) is merely a codification of the common law, and was properly construed by the trial judge. It clearly refers only to a conviction or acquittal at trial, and also applies

only where there is a clear-cut verdict of "not guilty" of murder, and nothing more. Had Parliament intended it to apply in such circumstances as are here present, it would have worded it differently.

C. L. Dubin, in reply: I did not suggest that "double jeopardy" was a special plea, but meant that the common law rule embodied in that phrase could be invoked as a defence under the general plea of not guilty: *Rex v. Quinn* (1905), 11 O.L.R. 242, 10 C.C.C. 412.

Section 873 has no bearing on the question now before the Court. It merely permits the starting of proceedings, and cannot in any way limit the defences open to an accused person.

The respondent's argument as to the effect of quashing a conviction *simpliciter* would enable the Crown to proceed again in every case, whatever the ground on which the conviction was quashed, provided the Court did not order a judgment or verdict of acquittal to be entered. If that were so, there would be no necessity for giving power to order a new trial, or for the repeated references by the English Court of Criminal Appeal to its lack of such a power.

On the contrary, I submit that the rule is that there can be no second trial unless such a trial is ordered by a Court having jurisdiction to order it.

The fact that the formal order of the Court of Criminal Appeal, in *Rex v. Barron*, *supra*, expressly ordered an acquittal is not conclusive. In the great majority of the reports in that Court the only note is "conviction quashed". It cannot be said that the English practice does not apply here because the Court there has no power to order a new trial. That argument might be available if the Court here had exercised its power to do so, but since it did not, the position is the same as where a conviction is quashed in England.

*Cur. adv. vult.*

28th June 1949. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant on the 17th March 1949, upon his trial before Mr. Justice Schroeder and a jury at St. Thomas, on a charge of manslaughter.

The appellant had been previously tried on an indictment for murder arising from the death of the same person. Upon his

first trial the jury brought in a verdict of manslaughter against appellant. From this conviction he appealed, and his appeal was allowed on the ground of misdirection of the jury by the trial judge: *Rex v. Welch*, [1948] O.R. 884, 92 C.C.C. 178, 6 C.R. 472. In his reasons for judgment in disposing of the appeal, Mr. Justice Laidlaw, referring to the jury's verdict of guilty of manslaughter, said at p. 890: "That verdict, having been reached after such misdirection, is not a valid conviction and must be set aside. At the same time, I make it clear that the accused has not been acquitted of the offence of manslaughter and I express no opinion as to what further proceedings the Crown can or ought to take against the appellant in the particular circumstances." Mr. Justice Hogg, who concurred in setting aside the conviction, said at p. 896: "I agree with the observations made by my brother Laidlaw that the appellant has not been acquitted of the crime of manslaughter." Mr. Justice Henderson, who, with Justices Laidlaw and Hogg, made up the Court that heard the appeal, was of the opinion that the appeal should be dismissed. The formal certificate of the Court's order, after a recital, was in these words: "THIS COURT DID ORDER that the said appeal should be and the same was allowed and that the said conviction should be and the same was vacated and set aside."

The obstacle in the way of ordering a new trial on setting aside the conviction was that the indictment contained only a charge of murder, and could contain no other: s. 856 of The Criminal Code, R.S.C. 1927, c. 36, The jury, in convicting appellant of manslaughter, had acquitted him of murder: s. 951(2), and that acquittal was not appealed against and had to stand. A new indictment charging manslaughter was necessary if the appellant was to be brought to trial again on that charge. A new indictment could not have its origin in the Court of Appeal, no matter how strongly the judges of that Court expressed their opinion that appellant had not been acquitted of manslaughter. Appellant contends that the order of the Court of Appeal was, in effect, an acquittal of that offence.

A new indictment charging manslaughter was preferred, and appellant was brought to trial upon it. Upon arraignment appellant entered a plea of *autrefois acquit*, and a jury was sworn to try the issue so raised. For the purposes of the trial of the issue it was agreed between counsel that the evidence to be



offered on the trial for manslaughter would be the same as the evidence given on the former trial on the indictment for murder, with the exception of any evidence given on the former trial going to prove an intent to kill. On the trial of the issue the jury found against the prisoner, substantially following the direction of the trial judge, who told them that, as he interpreted the order of the Court of Appeal, that Court, while it quashed the conviction, did not acquit the appellant of manslaughter. The trial judge thereupon, giving reasons at length, held that the new indictment must stand, and that the accused must plead thereto and raise any grounds of defence that he might desire to raise, or as he might be advised, by a general plea of not guilty. Appellant thereupon pleaded not guilty and his trial proceeded. The jury found the appellant guilty of manslaughter, and he was sentenced to ten years' imprisonment.

The appellant, on this appeal, submits that the learned trial judge was wrong in his instructions to the jury and in his judgment on the trial of the issue raised by the plea of *autrefois acquit*. Counsel for the appellant, in his able argument, submitted that the Court of Appeal, on the former appeal, did not order, and could not have ordered, a new trial on the indictment for murder, and that having concluded that the appeal must be allowed and that the verdict of guilty of manslaughter found by the jury at the first trial could not stand by reason of misdirection of the jury, the Court of Appeal had no other course open to it than to make the order it did make, and according to counsel's contention, that, in effect, is an acquittal, having regard to the terms of the statute under which it was made, s. 1014(3) of The Criminal Code. That subsection reads as follows:

"Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may

"(a) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

"(b) direct a new trial;

and in either case may make such other order as justice requires."

In plain terms the submissions of appellant amount to this: the conviction for manslaughter could not stand because of misdirection of the jury who found appellant guilty, therefore the Court of Appeal had to allow the appeal: a new trial could not be ordered, for the only indictment before the Court was for

murder, of which appellant was acquitted, and for which he could not be again put in jeopardy: the only course open to the Court of Appeal was under clause (a) of the subsection, and that provided for the directing of a judgment and verdict of acquittal upon quashing the conviction. All of this would have the highly desirable result, in the eyes of appellant's counsel, of letting his client go free, in spite of his conviction of manslaughter by two juries.

I do not think the Court of Appeal is so closely restricted by the terms of the statute. Attention must be paid to the use of the word "may" in the early part of the subsection, and to the concluding words "and in either case may make such other order as justice requires". The intention seems clear that the Court of Appeal should have a wide discretion, where justice requires it, to make some other order. In my opinion it was within the discretion of the Court of Appeal, in allowing the appeal, to set aside the conviction and to refrain from exercising its power to direct a judgment and verdict of acquittal.

But whether or not the Court of Appeal was acting within a discretionary power given it by the statute, in making its order, it did not direct a judgment and verdict of acquittal to be entered, and in fact none was entered. The judges of the Court of Appeal who supported the setting aside of the conviction made it abundantly plain that they did not intend that there should be an acquittal. There is no authority that I know of to insert in their order a direction they never gave, but expressly withheld. There is nothing in the record anywhere that supports the plea of *autrefois acquit*.

There being neither an acquittal nor a valid conviction of appellant for manslaughter, it is the contention of the Crown that there was nothing standing in the way of preferring a new indictment under s. 873 of The Criminal Code, or under the jurisdiction vested in the Court to enforce the criminal law: *Rex v. Elliott*, 62 O.L.R. 1, 49 C.C.C. 302 at 311, [1928] 2 D.L.R. 244.

For the appellant it was submitted that s. 909(2) of The Criminal Code stood in the way of this prosecution by way of a new indictment. That provision of the Code is as follows:

"A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter; and a previous conviction or acquittal on an indictment for manslaughter shall be a bar to a second indictment for the same homicide charging it as murder."

The application of this provision in the circumstances of this case depends upon whether there was a previous conviction or acquittal of manslaughter on the indictment for murder. Appellant does not contend that he was convicted. He does contend that he was acquitted, but that contention is exactly the same contention that is made in support of the plea of *autrefois acquit*. Appellant contends that the effect of the order disposing of his appeal to the Court of Appeal was an acquittal. If it was, the new indictment is barred by s. 909(2). But, for the reasons I have already stated, I do not think there was an acquittal by the Court of Appeal, and s. 909(2) has no application.

I would, for these reasons, dismiss the appeal.

*Appeal dismissed.*

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[WELLS J.]

**Smith et al. v. Daly and Booth Lumber Limited.**

*Timber—Estate of Inheritance in Standing Trees—Effect of Exception in Transfer—The Land Titles Act, R.S.O. 1937, c. 174, s. 104—Meaning of “merchantable timber”.*

There may be an estate of inheritance in standing trees. *Liford’s Case* (1615), 11 Co. Rep. 46b, applied; *Stukeley v. Butler* (1615), Hob. 168, referred to. Where the owner of the fee simple in lands conveys the lands to another, excepting from the grant all merchantable timber on the lands, the fee simple in the trees remains in the grantor and his successors in title, and the right to cut them cannot be defeated by non-user or lapse of time. *Beatty et al. v. Mathewson* (1908), 40 S.C.R. 557, distinguished; *Eastern Construction Company, Limited v. National Trust Company, Limited et al.*, [1941] A.C. 197, applied. The right is limited to trees in being at the time of the grant and exception, but is not limited to trees which were marketable at that time.

The words “merchantable timber” in such an exception should be construed as including all trees which are saleable, including pulpwood. *Re Fletcher* (1914), 31 O.L.R. 633, applied.

AN ACTION for damages and an accounting.

27th and 28th October 1948. The action was tried by WELLS J. without a jury at Pembroke.

*Arthur Maloney and James A. Maloney*, for the plaintiffs.  
*G. F. Henderson*, for the defendant.

29th June 1949. WELLS J.:—This is an action for trespass and damages to certain lands owned by the plaintiffs (subject to an exception reserved at the time of first transfer, to which I shall afterwards allude), brought against Murray J. Daly and Booth Lumber Limited for wrongful entry and cutting of timber, upon the lands concerned, by the defendant Daly under the authority of his co-defendant, and for an accounting for the timber cut. On behalf of the defendants it is alleged that Booth Lumber Limited owned the timber by reason of an exception in a transfer made under The Land Titles Act, now R.S.O. 1937, c. 174, by the late John Rudolphus Booth, who was a predecessor in title of the defendant Booth Lumber Limited, to the predecessors in title of the present plaintiffs, of land known as parcel 2411 in the register for the district of Nipissing. It is admitted by all parties that the present plaintiffs are the successors in title of the transferees of John Rudolphus Booth, and that the defendant Booth Lumber Limited is the successor and owner of any rights excepted by Booth at the time of the transfer by him. It appears from the certificate of ownership under The Land Titles Act, which was filed before me, that

in the year 1905 John Rudolphus Booth was the owner in fee simple of the parcel of land in question. At that time he transferred the lands in question to the Honourable Edward Curtis Smith and one Edson Joseph Chamberlin, the predecessors in title of the present plaintiffs. The transfer, of which an admitted copy was filed before me, shows that after a description of the lands the following words appear:

“Saving and Excepting the reservations and exceptions contained in the original patent from the Crown, namely, all ores, mines or minerals which are or shall hereafter be found on or under the said land, and the free use, passage and enjoyment of, in, over and upon all navigable waters which shall or may hereafter be found on or under or be flowing through or upon any part of the said land, and also right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons, together with the right to use so much of the banks thereof, not exceeding one chain in depth from the water's edge, as may be necessary for fishery purposes, also all Pine trees and other merchantable timber of every kind standing or being on said lands.”

No question is raised as to the pine, which was reserved in the patent from the Crown. The question before me concerns itself with the exception of “other merchantable timber”. This transfer, of course, was not a deed in the ordinary sense of the word, but by the operation of s. 104 of The Land Titles Act it is clear that it is to be treated as if it were made under seal and, as is provided, the instrument and every agreement, stipulation and condition therein has the same effect for all purposes as if it were made under seal. The transfer in question purports to be made for valuable consideration, namely, \$5, and, as is provided in s. 41 of The Land Titles Act, when registered confers on the transferee an estate in fee simple in the land transferred. The transfer was duly registered. It might well be that the problem raised in this action could have been dealt with in a more summary fashion by an application to the Court under the Rules, but the parties felt it desirable that all the facts should be laid before the Court, and in the result I cannot disagree with their opinion.

I may say, by way of preliminary observation, that it was established at the trial, in my view of the evidence, that while this transfer subject to the exception I have mentioned was

made in 1905, somewhere about the year 1924 and during the winter of 1934-1935 some cutting of timber was done on the lands in question by the successors in title to J. R. Booth. It was also proved to my satisfaction that it is quite feasible to ascertain at any time by boring what trees were standing on the lands in question in the year 1905. This seems to me to have been amply established by General Kennedy's evidence, which I accept. Subsequently, a more substantial cut was made late in the year 1944 and resulted in the bringing of this action, the plaintiffs claiming that the present defendant Daly, who did the actual cutting, and Booth Lumber Limited, who authorized him to do it, have lost any rights which they may once have had in the timber on the ground chiefly that they were not exercised within a reasonable time, and secondly, by reason of the operation of s. 4 of The Limitations Act, R.S.O. 1937, c. 118, and on another ground which was urged before me in argument that the exception is void for uncertainty.

It appears to be established beyond question that one may have an estate of inheritance in a tree. The matter is succinctly and, I think, accurately stated in Leake on The Law of Uses and Profits of Land, 1888, at p. 30:

"A grant, or an exception from a grant, of the trees growing in certain land, creates a property in the trees, separate from the property in the soil; but with the right of having them grow and subsist upon it. An estate of inheritance in a tree may thus be created; which would be technically described as a fee conditional upon the life of the tree. Also there may be a grant or exception of trees thereafter to grow on the soil. The separate property in trees growing and to grow upon certain land, admittedly the property of another, may also be proved by acts of ownership in cutting and taking away trees from time to time; the presumption from such evidence being that the land had been originally granted away, with an exception of the trees then growing or thereafter to grow in the soil. A grant or exception of trees apart from the soil implies a right to enter upon the land for the purpose of cutting and taking the trees, as a necessary incident of the property in the trees.—A licence to enter upon land and to cut down trees and take them away may be granted by the owner of the land without conveying to the grantee any property in the soil, or in the trees until cut down and taken by him. Such



right would be in the nature of a *profit à prendre* or profit to be taken from the land of another; and it is, therefore, treated hereafter in connection with that class of rights."

The statement of the law in *Liford's Case* (1615), 11 Co. Rep. 46b at 49a, 77 E.R. 1206, still stands. The principle is there stated as follows: "... a man may have an inheritance in fee-simple in lands, as long as such a tree shall grow . . . because a man may have an inheritance in the tree itself." And as was later said in the same case, at 52a: "... when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him, and them who would buy, power, as incident to the exception, to enter and shew the trees to those who would have them; for without sight none would buy, and without entry they could not see them." And later in the same passage: "So it is agreed in 2 R. 2. Bar. 237. If I grant you my trees in my wood, you may come with carts over my land to carry the wood."

To a similar effect, and in greater detail, the matter is discussed by Hobart C.J. in *Stukeley v. Butler* (1615), Hob. 168, 80 E.R. 316. A modern discussion of the problem is found in the dissenting judgment of Duff J. (as he then was) in the case of *Beatty et al. v. Mathewson* (1908), 40 S.C.R. 557 at 568, where, after quoting with approval part of the passage from Leake which is set out above, he proceeds to quote from the second authority on which he relies, as follows:

"The second, from Washburn on Real Property at page 16:

"'But if the owner of land grants the trees growing thereon to another and his heirs, with liberty to cut and carry them away at his pleasure, forever, the grantee acquires an estate in fee in the trees, with an interest in the soil sufficient for their growth, while the fee in the soil itself remains in the grantor.'

"The views of these writers seem to be fully supported by authority. Those cited by Mr. Challis at p. 229 of his book on the Law of Real Property establish beyond question that a determinable fee may be validly limited to a man and his heirs 'as long as such a tree shall grow' or 'as long as such a tree stands'; and the reason why such limitations are good is given in *Liford's Case*, [*supra*], and is there said to be 'because a man may have an inheritance in the tree itself.' In the same case at page 49b there occurs this passage:

'If I by deed grant all my trees within my manor of G. to one and his heirs the grantee shall have an inheritance in them', although it is quite clear from *Liford's Case*, at p. 49a, as well as from other authorities; *Ive's Case*, 5 Coke 11a [77 E.R. 64]; *Whilster v. Paslow*, Cro. Jac. 487 [79 E.R. 416]; that by a grant of trees *simpliciter* no soil passes but 'sufficient nutriment to sustain the vegetative life of the trees' only.

"It seems nevertheless to be indisputable that growing timber may be so granted as to vest it *in sitû* in the grantee as a chattel; *Stukeley v. Butler*, [*supra*]; *Herlakenden's Case*, 4 Coke 62a at p. 63b [76 E.R. 1025]; *Anon*, Owen 49 [74 E.R. 891]; *Shepherd's Touchstone*, 471; *Williams, Executors*, 543; notwithstanding the vigorous criticism by Chitty J. in *Lavery v. Pursell*, 39 Ch. D. 508 at pp. 515-517, I think it is too late to dispute that doctrine. I have however been unable to find any shred of authority or any suggestion of a good reason for doubting the proposition stated by Mr. Leake and Prof. Washburn — in the passages I have quoted—that growing timber *in sitû* may as such by apt words be vested in a grantee for an estate of inheritance apart from the property in the soil.

"It follows from this that the words last quoted from the instrument in question would if they stood alone unquestionably have the effect of vesting in the grantee an estate in fee simple in the timber described. I think moreover that when you have a grant of timber *in sitû* in fee simple the law confers as one of the legal incidents of the grant the right to go upon the land to enjoy the timber, including of course the right of cutting and removing it. In *Liford's Case*, it was resolved (52a):

" 'When the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him, and them who would buy, power, as incident to the exception, to enter and shew the trees to those who would have them; for without sight none would buy, and without entry they could not see them.' and it is further said:

" 'If I grant you my trees in my wood, you may come with carts over my land to carry the wood, *temp.* Ed. 1 Grants 41. *Lex est cuicumque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit.*' In *Stukeley v. Butler*, [*supra*], Hobart C.J. gives many examples of the application of this principle, and it was there held that even when the timber

is sold as a chattel such a right is vested in the grantee of standing timber as incident to the grant."

I mention this in particular because *Beatty et al. v. Mathewson* is cited to me as an authority in support of the plaintiffs' contention that the right to cut the trees, not having been exercised within a reasonable time, is now barred. *Beatty et al. v. Mathewson* was the converse of the present case. There was not an exception in a grant by one already having a fee simple, but there was what purported to be a grant of the fee simple in certain trees, and the document contained a clause in the habendum indicating that it may have been a grant for a term of years, the number of years being left blank. As the case was decided by the majority of the Supreme Court, however, the document in that case was dealt with not as a conveyance of the fee simple but as a conveyance of a chattel interest in the trees, which is of course an entirely different matter. As Idington J. said at p. 564:

"I think, for these reasons and those set forth above, that this curiosity of an inapt use of words cannot be held to be a grant of any such estate in the land as would make it imperative to reject the later part of the document, and that it is to be taken as of a kind that we can, as was done in the *Hammersly Case*, 11 Ir. Ch. 229, reject the word 'heirs' entirely, or hold that it is impossible to give a greater effect to it than the later expressions imply should be given it.

"It thus comes, I think, to what was a reasonable term of years, as implied in the document as it stands, and giving effect to its entire scope for removal of the timber in question. I agree with the learned trial judge that that limit of time had been so far passed before the acts complained of, that the rights the vendee once had under the agreement in question had then expired."

On the construction of that particular document, all that was held was that there was not a conveyance of the fee simple in the standing timber but that the grantee was given the right to cut and remove it within a reasonable time and that such time had elapsed before the entry to cut, which occasioned the action. This reasoning cannot, I think, apply to the case at bar, for here the fee simple was vested in the transferor, J. R. Booth—he never parted with it; he does not purport to grant all merchantable timber but purports to except it from the grant.



And if, as is suggested by the authorities quoted, such an exception can be validly made, then the fee simple in all merchantable timber unquestionably remained in J. R. Booth, and there can be no suggestion that there was a chattel interest as was found in *Beatty et al. v. Mathewson*.

I am also, I think, confirmed in the view that the correct statement of the law is that stated by Duff J. (later C.J.C.) from his reasons for judgment in the case of *The National Trust Company, Limited et al. v. Miller et al.*; *Schmidt et al. v. Miller et al.* (1912), 46 S.C.R. 45, 3 D.L.R. 69, reversed *sub nom. Eastern Construction Company, Limited v. National Trust Company, Limited et al.*, [1914] A.C. 197, 15 D.L.R. 755, 25 O.W.R. 756, where his dissenting judgment was later specifically approved by the Privy Council who adopted his reasoning in their report. In that case there was an action for the taking of certain pine trees which had been reserved and excepted in the grant from the Crown, and the authorities cited by Duff J. in *Beatty et al. v. Mathewson*, *supra*, are again adverted to at p. 58 of his reasons for judgment in this case. When the matter came before the Judicial Committee of the Privy Council, Lord Atkinson, who gave the judgment of the Judicial Committee, had this to say at p. 208:

"Under these circumstances the primary question for consideration appears to their Lordships to be the nature and extent of the right of the Crown to the pine trees growing, or to grow, on the mining locations of the plaintiffs under the patent and lease respectively granted to them. When one turns to ss. 39 and 40 of the Mines Act, one finds that by sub-s. 1 of s. 39, made applicable to leases by s. 40, it is expressly enacted that patents for all Crown lands sold or granted shall contain a reservation of all pine trees standing or being thereon, and that these pine trees shall continue to be the property of Her Majesty. Duff J. in his able and convincing judgment, cited the . . . following cases, namely, *Herlakenden's Case*, [*supra*], in which it was held that if trees be excepted in a feoffment to a man and his heirs, the trees in property are divided from the land, though in fact they remain annexed to it, and that if one should cut them down and carry them away it would not be felony. Secondly, *Liford's Case*, [*supra*], in which it was decided, amongst other things, that where a lease is made of land for a term of years, the lessee has but a special interest in the trees,

as to 'have the mast and fruit of the trees and shade for his cattle,' but that the inheritance of the trees was in the lessor".

It is also, I think, quite clear that what was done here was to create an exception, as Anglin J. (later C.J.C.) said, at p. 84 of the *Miller* case: "That such an exception of standing trees (it appears to be an exception though called a reservation, *Douglas v. Lock*, 2 A. & E. 705, at pp. 743 *et seq.* [111 E.R. 271]), has the effect of 'dividing the trees in property from the land, although *in facto* they remain annexed to the land,' *Herlakenden's Case*, [*supra*], at p. 63b, and 'parcel of the inheritance' *Liford's Case*, [*supra*], at p. 48b, is old and undisputed law."

Under these circumstances, following the authorities I have quoted, I must find that the successor in title to J. R. Booth, that is, Booth Lumber Limited, has an estate in fee simple in all merchantable timber of every kind standing or being on the said lands. As the date of the transfer from J. R. Booth, which contained the exception, is the 28th June 1905, it was argued before me that even if this exception were good, it was limited to trees which were merchantable in 1905 and which could have been merchanted or sold at that time. I do not think the exception is as narrow as the plaintiffs allege. Murray's New English Dictionary defines "merchantable", on the one hand, as fit or prepared for market, and further, as that which may or can be bought or sold, that which is saleable or marketable. In my view, what was intended by the use of the word "merchantable" was to indicate timber which was saleable or marketable when the owner desired to deal with it.

In relation to the word "timber", reference may be also made to the judgment of Middleton J. (later J.A.) in *Re Fletcher* (1914), 31 O.L.R. 633 at 637, 19 D.L.R. 624, where the word was used in a will as follows: "The second question raised is the meaning of the provision that timber shall, notwithstanding the devise of the land, not form part of the property devised, but form part of the residuary estate. 'Timber' is, I think, to be confined to trees which are not ornamental and shade trees, and which are capable of being sold for manufacture into lumber. It will not cover mere brush, which is not of merchantable value, nor will it authorise the destruction of trees which have a value apart from their value as lumber by reason of their use for ornamental and shade purposes." For my part, I would add

timber which is capable of being sold; in other words, trees which are marketable or saleable. This would clearly, I think, include pulpwood.

In view of the nature of the estate excepted from the transfer by Booth to the plaintiffs' predecessors in title, I do not think that the exception can be confined to those trees which were fit to be prepared for market on the 28th June 1905, because the estate excepted was one which was not subject to any limitation as to time, apart from the operation of the Statute of Limitations by adverse possession which, in my opinion, is not shown in this case. I think the words must have meant timber of every kind standing or being on the lands on the 28th June 1905 which might at any time be merchantable or saleable. The only limitation I can find in the exception is that the trees must have been in being in 1905.

As I have indicated, it was also argued before me that the exception in question was void for uncertainty. I am unable to appreciate this argument, as it is amply established by the evidence that it is quite possible to ascertain by physical examination of the trees in question what was included in the exception made by J. R. Booth in the transfer made in 1905. It is apparent that by making a single test it is possible to determine the age of any tree and to calculate with more than reasonable certainty whether it was in fact in being at the time I have mentioned. It is also established by the evidence that it was the practice of the lumber trade to hold limits for many years, and to crop them as and when it was commercially profitable so to do. It is quite clear that there is a time when a tree reaches its prime and afterwards it degenerates. But it is, apparently, also a well-recognized practice in the trade to hold limits of standing timber for many years until that particular type of timber is marketable or saleable and is reasonably accessible and can be harvested at a reasonable profit. All these considerations, which must have been present to the mind of the transferor in 1905, because he was operating a lumber business as his successors do now, lead me to believe that there was no limitation such as suggested by the plaintiffs, but merely the one I have indicated which, I think, must arise from the very words of the exception itself. There is no evidence before me which would indicate that any of the trees which were cut at any time by the defendant Booth Lumber Limited or under



their authority or that of their predecessors in title were trees which came into being after 1905.

Under these circumstances, the plaintiffs' case fails on all grounds and the action must be dismissed with costs.

*Action dismissed with costs.*

*Solicitor for the plaintiffs: James A. Maloney, Renfrew.*

*Solicitors for the defendants: Gowling, McTavish, Watt, Osborne & Henderson, Ottawa.*

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[BARLOW J.]

**Fawcett et al. v. The Township of Euphrasia.**

*Highways—Creation—Validity of By-law—Sufficiency of Description—Dedication by User—Acceptance by Expenditure of Public Moneys—Mandamus.*

A by-law providing for the opening of a township road is invalid unless it contains a description sufficient both to enable a surveyor to lay out the road and to show from whom the land for the proposed road is to be obtained. *St. Vincent v. Greenfield* (1887), 15 O.A.R. 567; *In re Brown v. The Municipal Council of the County of York* (1852), 8 U.C.Q.B. 596, quoted and applied; other authorities referred to. Even where a by-law is defective in this respect, if a road has in fact been used by the public over a considerable time, and work has been done upon it by the municipality, it may be assumed that the road is in accordance with the by-law which would otherwise be invalid. *Andrews v. Township of Pakenham* (1904), 4 O.W.R. 6 at 7; *Township of Elmsley South v. Miller* (1905), 6 O.W.R. 726 at 732, quoted and applied; other authorities referred to. These facts, however, must be clearly established by the evidence.

*Mandamus—When Remedy Refused—Discretion of Municipal Council as to Expenditure of Public Moneys.*

*Municipal Corporations—Discretion of Municipal Council—Expenditure of Public Moneys—Opening of Roads—Mandamus.*

*Mandamus* will not lie against a municipal corporation to compel it to open a road. The matter is one involving the expenditure of public money, as to which a discretion has been given to the municipal council by the ratepayers who elected it, and the Court will not interfere with the exercise of this discretion. *Hislop v. The Township of McGillivray* (1888), 15 O.A.R. 687 at 694, affirmed (1890), 17 S.C.R. 479, applied; other authorities referred to.

AN ACTION for a declaration, a mandatory order, and damages.

13th and 14th June 1949. The action was tried by BARLOW J. without a jury at Owen Sound.

*J. F. Woods, K.C.*, for the plaintiffs.

*F. G. MacKay, K.C.*, and *Colin E. Bennett*, for the defendant.

5th July 1949. BARLOW J.:—The plaintiffs are two of the six heirs of Edward Fawcett, who died intestate in the year 1933, no administration of the estate having been applied for, and who at the time of his death was the registered owner of the north half of lot 4, and the south half of lot 5, concession 3 in the township of Euphrasia in the county of Grey. They claim a declaration that By-law 11 of the defendant corporation, passed on the 11th August 1933, purporting to repeal a part of By-law 242, establishing a road between the 3rd and 4th concessions of the township of Euphrasia and between the 3-4 and 6-7 side roads, is void and of no effect, and that By-law 242 of the said corporation, passed in the year 1876, is a valid and subsisting by-law; they also claim a mandatory order requiring the defendant corporation to keep the road described in By-law 242 open and in a proper state of repair, and to maintain it as a township road, and damages.

The farm of which the plaintiffs are part owners consists of 200 acres with a frontage of 120 rods fronting on concession 3 road, near which road the house and barns are situate, and which road is used for farm ingress and egress, by a depth of 272 rods to the line between concessions 3 and 4, which is the line of the alleged road, which the plaintiffs ask to be opened. Some 80 acres at the rear of the farm are bush. The plaintiffs claim that because of the rough, hilly contour of their land, the timber on this 80 acres cannot be taken out by concession 3 road as economically and conveniently as if a road were available from the rear of their property southerly on the line between concessions 3 and 4 to the side-road between lots 3 and 4. It is possible to take the timber out by the road at the front of their farm, but it would involve additional expense.

It is admitted by counsel for the defendant that if By-law 11 purports to close an already existing road, due compliance has not been made with the statutory requirements, and the by-law would thus be invalid. Counsel for the defendant contends, however, that By-law 242 is invalid, and it may therefore be unnecessary to deal with the effect of By-law 11, which merely purports to repeal that part of By-law 242 with respect to the

alleged road which, if never actually opened, does not require to be closed.

The plaintiffs, however, rely on By-law 242 as having established the road in question in 1876.

Roads may be established in three different ways: (1) by the original survey and later opened by by-law of the township council; (2) by by-law of the township council; and (3) by dedication and user.

The plaintiffs allege in their pleadings that the alleged road was established by By-law 242, passed by the defendant corporation in 1876, which by-law, filed as ex. 11, is as follows:

"Be it enacted by the Municipal Council of the Township of Euphrasia in Council assembled, and it is hereby enacted by authority of the same.

"That a new road be established, between the third and fourth Concessions, of this Township, crossing the Six southerly lots of said Township, and to be as hereinafter described by Thomas Gilleland Esq. P.L.S.

"The said new road commences in the centre of road allowance between lots 6 and 7, at the distance of four chains and sixty-nine links easterly from the post between the third and fourth concessions, thence 1st, S. 4° 30' E. 11. 14 magnetically. 2nd, S. 27° 00' E. 4.75.

3rd, 22° 00' E. 11, 29 more or less to the limit between the said third and fourth Concessions, thence Southerly along the last named limit 151 chains, more or less to the northerly limit of the town line between Euphrasia and Artemesia.

"Robert Myles,

Reeve.

"Robert Dunlop,

Tp. Clerk.

Township Hall Euphrasia.

27th May 1876."

The plaintiffs do not allege dedication in their pleadings.

The defendant alleges that By-law 242 is invalid on the ground that it contains no proper description of the land which would require to be obtained by deed or expropriation for the road allowance.

The evidence satisfies me that no proper description is contained in the by-law. It merely refers to the line between concessions 3 and 4 in the said township. No width is given for



the road; the starting-point cannot be determined; it does not show whether the land for the road is to be acquired from the lots in concession 3 or from those in concession 4, or part from each concession. Furthermore, the bearings cannot be ascertained. The description is so uncertain that a surveyor could not lay out the road.

Unless such a by-law contains a description sufficient to enable the road to be laid out, and to ascertain from whom the land is to be obtained, it is invalid: see *St. Vincent v. Greenfield* (1887), 15 O.A.R. 567, affirming 12 O.R. 287. At p. 569 Osler J.A. says:

“According to all the cases which have been decided in our Courts on the subject, from the earliest to the present time, it is essential to the validity of a by-law by which a corporation professes to expropriate land for, and to establish and lay out a highway, that the course, boundary, and width of such highway should be capable of being ascertained either from the by-law itself or from some document or description referred to by it which may be treated as incorporated therewith. Failing this the by-law is necessarily inoperative and void, since, merely as regards the width of the road, it cannot be seen whether it was to be of the maximum or minimum width, prescribed by the Act, or of some width intermediate between the two.”

See also: *Rex v. Sanderson* (1833), 3 O.S. 103; *Reg. v. Rankin* (1858), 16 U.C.Q.B. 304; *Re Thompson and The United Townships of Bedford, Olden, Oso, and Palmerston* (1862), 21 U.C. Q.B. 545.

In *In re Smith and Municipal Council of Euphemia* (1852), 8 U.C.Q.B. 222, a by-law which did not assign any width to the road it purported to describe was held to be bad.

Also see *In re Brown v. The Municipal Council of the County of York* (1852), 8 U.C.Q.B. 596, where Robinson C.J., at p. 598, says: “We have not the least doubt that all by-laws authorizing new roads should, either by reciting the whole description of the road given in the surveyor’s report, or by describing it fully, whether they refer to the report or not, make it plain to every one that sees the by-law where the road is to run and how wide it is to be, and should not leave the information to be gleaned from documents not referred to in it as annexed, and not in fact annexed; documents which may not be found upon search, or which may not be evidently the same as were intended to

be referred to or may when produced be found inconsistent or defective in themselves, and may in truth be found to report such a road as the council could not lay out."

See: *Dennis v. Hughes et al.* (1852), 8 U.C.Q.B. 444; *Davison et al. v. Gill* (1800), 1 East 64 at 72, 102 E.R. 25.

For the above reasons I am clearly of the opinion that By-law 242 is invalid. Furthermore, even if By-law 242 were valid, no steps have ever been taken under the by-law to acquire from the private owners the land necessary for the road, either by deed or by expropriation. No such steps have ever been taken by the defendant corporation, and from this standpoint it would appear that the council has never expressed a desire to have the road opened: see *Black v. White et al.* (1859), 18 U.C.Q.B. 362; *Dennis v. Hughes et al.*, *supra*.

If, however, over a considerable period of time a road has been used by the public and has had work done upon it by the municipality, then it might be assumed that such a road complied with what otherwise would be an invalid by-law.

See *Andrews v. Township of Pakenham* (1904), 4 O.W.R. 6 at 7, where Britton J. said: "If the council had acted upon the by-law as to this part of what is called the highway, and if it had been travelled as such, the council and ratepayers regarding it as a highway, I would at this distance of time be very loth to pronounce the by-law bad merely because formalities required for its passing had not been complied with . . . in the absence of the clearest proof to the contrary, the presumption that the necessary formalities were complied with should prevail." (On the evidence it was held that the highway in question had never in fact been established).

See also *Township of Elmsley South v. Miller* (1905), 6 O.W.R. 726 at 732, where Street J. said: "The long user of the road, however, by the public as a highway since the passing of the by-law [for opening it], without objection of any kind for many years, coupled with the expenditure of public money and the performance of statute labour upon it, affords sufficient grounds for applying the presumption that the by-law was legally passed."

Also see *Palmatier v. McKibbon* (1894), 21 O.A.R. 441; *Dickson v. Kearney* (1888), 14 S.C.R. 743.

The plaintiffs have not alleged dedication, but even if they do rely on such an allegation, they can only succeed if it is

shown that there has been user over a long period of time and expenditure of public money.

I must now proceed to deal with the facts as I find them on the evidence.

The evidence adduced by the plaintiffs is not very satisfactory. Even if I accepted all the evidence adduced by the plaintiffs and their witnesses, I could not find any evidence to show that at any time down through the years there was any public money expended or statute labour done on the alleged road on the line between concessions 3 and 4, between the 3-4 side road and the 6-7 side road.

The evidence of user must now be examined. Except for the evidence of Mrs. Maud Fawcett, the mother of the plaintiffs, none of the witnesses says that the alleged road was ever used except as a winter road when the snow was deep for the purpose of taking out logs, and any such road wandered around to find the best way southerly to the side road between lots 3 and 4. From the demeanour of Mrs. Fawcett in the witness-box, I was not impressed with her evidence. Her evidence as to where her husband drove when he went out, as she alleges, by the road in question, with a democrat wagon, and that he passed over the bridge in the ravine, when taken with her evidence that the whole area was a commons or open fields, does not convince me that the line of the alleged road was followed or used.

Taking this with other evidence adduced satisfies me that it was a case not of following any set road allowance but of driving over the open fields to the 3-4 side road. Furthermore it would appear to me that the only bridge over the ravine was on the Smith property, some 30 or 40 rods to the west of the line of the alleged road. Apart from the evidence of Mrs. Fawcett the other evidence shows that in winter logs were taken out over a winter road that wandered around, going undoubtedly over the stone bridge on the Smith property and then southerly, but not using any alleged road allowance. Furthermore there is no evidence to show exactly what the plaintiffs considered to be the road allowance, whether part of it was taken from their property or whether all of it was taken from the property in concession 4. Until this is determined, it would be impossible for the Court to determine what was alleged to be used as a road allowance.



I was not impressed with the evidence of the two plaintiffs or that of certain other witnesses as to the remains of an alleged bridge over the ravine on the line of the alleged road. I prefer to accept the evidence of the other witnesses, who say that no such remains of a bridge exist. The plaintiffs' witness James Harbottle Jr. struck me as being an honest witness. His evidence shows quite clearly that timber was taken out from lots 4, 5 and 6 on concession 3, but the road followed did not follow the line of the alleged road. This is borne out by other evidence. I accept the evidence of Hugh Smith. His evidence satisfies me that when the plaintiff took out logs in 1938 and the following years, at which time they cut the line fence between their property and that of Smith, they went out over Smith's property and did not go out on the line of the alleged road.

From a careful perusal of all the evidence, I am satisfied that not only was there no expenditure of public money or statute labour on the alleged line of road, but no user was ever made of it by the public. I cannot find, on the evidence, that there was either dedication or user. Furthermore, the onus is upon the plaintiffs and their evidence falls far short of satisfying the required onus.

By-law 242 purported to cover the line between concessions 3 and 4 from the town line along the southerly limit of lot 1 to the road allowance between lots 3 and 4, and from this road allowance to the road allowance between lots 6 and 7. There is and has been for years a road along the line between concessions 3 and 4 from the town line to the road between lots 3 and 4. Statute labour and public money have been expended upon this road and the same is used by the public. It has clearly been dedicated by such user, and by acceptance by the council by spending public money. It could not be defined by By-law 242, and therefore becomes what may be known as a dedicated road. It is contended by counsel for the plaintiffs that this is a part of the alleged unopened road north of the side-road between lots 3 and 4 and that this binds the council to open this road to the north. I cannot so find, for the reason that the road to the south can only be known as a dedicated road. In the first place council never did, by By-law 242, take the necessary steps to open the road between the town line and the side-road between lots 3 and 4. This road was clearly

opened by dedication and acceptance as set out above, and this does not affect the road to the north.

It is clear to me that By-law 242 is invalid and on this ground and for the reasons above set out the action fails.

But even if the by-law were valid, the plaintiffs' action must fail on another ground.

The plaintiffs ask for a *mandamus* requiring the defendant corporation to keep the alleged road open, and in a proper state of repair, and to maintain it as a township road.

The law is well settled that *mandamus* does not lie against a municipal corporation to compel it to act in a matter of this kind. This is a matter which involves the expenditure of public money. The discretion of the council as to the opening of the road, and as to the expenditure of public moneys, cannot be interfered with by *mandamus*. The ratepayers who provide the public money have, by their votes, elected the council, and have placed in it a discretion as to the expenditure of such public money. The Court ought not to interfere by *mandamus* with the council's exercise of this discretion.

The council did so exercise its discretion with respect to the road in question when it purported to pass By-law 11, purporting to repeal By-law 242, in so far as the alleged road is concerned. The council has clearly shown that it does not consider it advisable to open the road in question.

It would appear to me from the evidence, and from the fact that even if the road were opened it would only be used by the plaintiffs, for taking out a small quantity of timber in the winter time, and not by the public generally, that the council has properly exercised its discretion: see *Hislop v. The Township of McGillivray* (1888), 15 O.A.R. 687, affirmed (1890), 17 S.C.R. 479. See particularly the judgment of Osler J.A. at p. 694 (15 O.A.R.):

"It is in my opinion a matter which rests in the discretion of the council as representing the whole municipality to determine whether they will open for travel a road over any particular road allowance within their jurisdiction. When they have so opened it, and until they by by-law legally close it, they are no doubt bound by law to keep it in a state of repair suitable to the condition of the community and adequate to their wants.

"But I am aware of nothing in the Act which gives, as it were, an appeal from the discretion of the council to a jury, or to the court, or imposes upon them any such specific duty, or entrusts them with such a power to be exercised in favour of

persons specifically pointed out, as a Court can direct the performance of. The council must be best qualified to judge, and I think it was intended that they should be the judges, having regard to their intimate knowledge of the affairs and wants of the municipality, whether from a judicial point of view, or the necessities of the case, or otherwise, it is desirable to open any particular road allowance, or whether the needs of the community may not be better served by opening a road in lieu thereof.

"2. If the discretion of the council was open to review, my opinion would be that in the circumstances of this case it had been properly exercised."

See also: *Cummings v. The Town of Dundas* (1907), 13 O.L.R. 384; *Re Metro Oil Ltd. and The City of Toronto et al.*, [1935] O.R. 137 at 140, [1935] 2 D.L.R. 208, affirmed [1935] O.R. 338, [1935] 3 D.L.R. 303, and *Schraeder v. The Township of Grattan*, [1945] O.R. 657, [1945] 4 D.L.R. 351.

Before I leave the question as to the discretion of the defendant corporation, it is of interest to note that the evidence of the plaintiff shows that there are some 1,500 trees on the 80 acres of bush, which the plaintiffs would require to take out over the alleged road. I question whether this is not an exaggeration. But accepting this evidence, and taking the assessor's estimate of 50 board feet average per tree, it would make some 75,000 board feet. This, valued by the evidence at \$30 per 1,000 board feet, places a value of \$2,250 on the timber. The evidence shows that it would cost, at the lowest estimate, much more than the total value of the timber to construct a road for the use of the plaintiffs. This appears to me to be entirely unreasonable.

The plaintiffs also claim damages. In the light of my findings of fact, no damages can be granted. But even if I were to find the plaintiffs entitled to damages, there is not sufficient evidence before me upon which to assess such damages. When damages are claimed, they must be proved with sufficient particularity to enable the Court to assess them within some reasonable degree of accuracy.

The plaintiffs' action will be dismissed with costs.

*Action dismissed with costs.*

*Solicitor for the plaintiffs: John F. Woods, Barrie.*

*Solicitors for the defendant: Alberry and Bennett, Meaford.*



## [COURT OF APPEAL.]

**MacDonald v. The Town of Goderich et al.**

*Negligence—Dangerous Premises—Liability of Lessor and Lessee as against Third Persons—What Constitutes Occupancy within Rules—Importance of Control.*

L and three other persons (referred to hereafter as "L et al.") entered into an arrangement with one B, the lessee of a skating rink owned by the Town of G, under which L et al. were to have the right to the use of the rink for the playing of a stated number of games by a hockey team sponsored by them, paying B \$50 for each game played and being entitled to the entire proceeds. They looked after the sale of tickets and were responsible for seating the spectators, while B agreed to supply the building, ice and power, to clean the ice between periods, to allow the team three practice periods a week without extra charge, and to be on hand during the progress of the games so as to make himself available for such further service as might be required by L et al. The plaintiff, attending a game as a spectator with a ticket bought for him, was injured as the result of a dangerous condition of the premises which would have been discovered by any competent person making a proper inspection, but was not apparent to the naked eye. He sued the Town, B, and L et al.

*Held*, the plaintiff could not succeed as against the Town. It was established law in Ontario that a landlord owed no duty to third persons entering the demised premises during the tenancy to see that they were safe, even where, as between himself and the tenant, he had undertaken the obligation to repair. *Robbins v. Jones* (1863), 15 C.B.N.S. 221; *Lane v. Cox*, [1897] 1 Q.B. 415; *Cavalier v. Pope*, [1906] A.C. 428; *Taylor v. The People's Loan and Savings Corporation*, [1930] S.C.R. 190, applied. There was here no qualification of this general rule in the case of buildings devoted to "public or semipublic use", as laid down in such American decisions as *Martin et al. v. City of Asbury Park* (1933), 168 A. 612 at 613.

*Held*, further, L et al. were liable to the plaintiff (B's liability was established at the trial, and he did not appeal). It was unnecessary to decide the precise scope of the doctrine laid down in *The Moorcock* (1889), 14 P.D. 64; *The Bearn*, [1906] P. 48; *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Limited* (1922), 52 O.L.R. 222; 54 O.L.R. 174; 41 T.L.R. 21; and *Drinkwater v. Morand* (1929), 64 O.L.R. 124, where inviters had been held liable for injuries resulting from dangers in the premises of others on to which they had, by right, invited other persons. *Duncan v. Cammell Laird, Limited et al.* (1944), 171 L.T. 186; [1946] A.C. 401; *Humphreys v. Dreamland (Margate), Ltd.* (1930), 100 L.J.K.B. 137, discussed. It was sufficient to say that L et al. were in sufficient occupation, possession and control of the premises to have the legal right, which they exercised, to invite the plaintiff thereon, and that upon them was imposed a corresponding duty to take reasonable care to see that the premises were safe, or to warn the plaintiff of an existing danger which the exercise of reasonable care on their part would have disclosed.

Judgment of MACKAY J., [1948] O.R. 751, affirmed.

APPEALS from the judgment of Mackay J., [1948] O.R. 751, [1948] 4 D.L.R. 569, dismissing the action against the Town of Goderich, and awarding the plaintiff damages for physical injuries against the other defendants.

7th and 8th March 1949. The appeals were heard by ROACH, HOPE and AYLESWORTH JJ.A.

*J. R. Cartwright, K.C. (R. C. Hays, K.C., with him)*, for the defendants Louzon, Westbrook, Doak and Paquette, appellants: An examination of the principles underlying the decisions shows that the law has imposed liability for dangerous premises on the occupier rather than either an owner out of possession or a licensee merely there on a temporary occasion, because the occupier is the person who has real control of the premises and an opportunity to exclude persons and to make an inspection at his leisure, and to make repairs if necessary. If the rule applied by the trial judge were to prevail, it would mean that a singer who rented a hall for a single evening, providing ticket-sellers, ushers, etc., would be liable for an accident resulting from a dangerous condition existing in the premises. As a matter of common sense there should be no liability in such circumstances, nor should we be held liable in this case. [AYLESWORTH J.A.: Assuming that Babb remained the occupier, which is now conclusively established, is it not arguable that your clients might be liable, apart from any question of occupancy, as having been negligent in arranging seating accommodation in a place which they should have known to be dangerous?] The balcony had been there for many years, and was provided by the owner and Babb as a place for spectators. Indeed, it would appear from the evidence that we had not the final say in that matter.

The trial judge was right in holding that Babb was the occupier, and he should have found that we were mere licensees with a limited interest: Hill and Redman's Law of Landlord and Tenant, 10th ed. 1946, p. 7; Williams, Canadian Law of Landlord and Tenant, 2nd ed. 1934, p. 4, art. 2; *Clore v. Theatrical Properties Ltd. et al.*, [1936] 3 All E.R. 483.

Being in the position of mere licensees, we were under no legal liability as to the safety of the premises. There appears to be no authority binding on this Court that is precisely in point, but the following cases deal to some extent with the point: *Marshall et al. v. The Industrial Exhibition Association of Toronto et al.* (1901), 1 O.L.R. 319 at 328, affirmed 2 O.L.R. 62; *Flynn v. Toronto Industrial Exhibition Association* (1905), 9 O.L.R. 582; *Oxford v. Leathe* (1896), 43 N.E. 92 at 93; *Fox v. Buffalo Park* (1897), 21 App. Div. 321 at 327, affirmed 163 N.Y. 559; *Martin et al. v. City of Asbury Park* (1933), 168 A. 612; *Pike v. The Polytechnic Institution* (1859), 1 F. & F. 712, 175

E.R. 918; Restatement of the Law of Torts, 1934, vol. 2, s. 359; Restatement in the Courts, perm. ed. 1932-44, s. 359 (the "Restatement" was commented on by Davis J. in *Canadian Pacific Railway Company v. Kizlyk*, [1944] S.C.R. 98 at 105, [1944] 2 D.L.R. 81, 56 C.R.T.C. 305). [AYLESWORTH J.A.: Is it not the fact that the English cases make no distinction, as to an owner's liability, according to whether or not the premises are intended for public use?] That is so. I refer also to *Payne and Payne v. Maple Leaf Gardens Limited et al.*, [1949] O.R. 26 at 27, 30, [1949] 1 D.L.R. 369.

Our submission is that the occupier's duty as to inspection and repair is not shifted to a casual licensee in circumstances such as are here present. [AYLESWORTH J.A.: Does it make any difference that the licensee is only "casual"? Would the same principle apply if the licensee took the premises for daily games throughout a season?] A line might be drawn at the point where a reasonable man would think that the licensee, because he had the premises for so much of the time, had assumed the duty of inspection and repair.

I rely also on Salmond on Torts, 10th ed. 1945, p. 470; *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; *Duncan v. Cammell Laird, Limited et al.*; *Craven v. Same*; *Duncan v. Wailes Dove Bitumastic, Limited*; *Craven v. Same*, 171 L.T. 186, [1943] 2 All E.R. 621 at 627 (reversed on other grounds 171 L.T. at 191, [1944] 2 All E.R. 159), and on appeal to the House of Lords, *sub nom. Woods v. Duncan et al.*; *Duncan et al. v. Hambrook et al.*, [1946] A.C. 401 at 443, [1946] 1 All E.R. 420.

Although there have been many cases where occupants of premises have been sued, I can find none in the British Empire where an action has been brought against persons in the position of these appellants.

The quantum of damages awarded by the trial judge is excessive. There is no dispute about the out-of-pocket expenses, but there is no basis for an award for loss of salary, since the plaintiff had not in fact lost anything, because of his accumulated sick leave, and there was no question of a reduction of future sick leave because of the termination of his employment with the Government. [AYLESWORTH J.A. referred to *Cossitt v. Canadian Pacific Railway Company*, [1949] O.W.N. 141,



[1949] 2 D.L.R. 201.] We do not quarrel with the allowance of \$300 for pain and suffering, but \$4,000 for permanent disability is excessive: *Kennedy et al. v. Hanes et al.*, [1940] O.R. 461, [1940] 3 D.L.R. 499, and on appeal [1941] S.C.R. 384 at 387, [1941] 3 D.L.R. 397. There is nothing to indicate that this disability caused any financial loss to the plaintiff.

*Frank Donnelly, K.C.*, for the plaintiff, respondent (and appellant as against the Town of Goderich): These four defendants were in possession of the rink on the evening in question; Babb's services were similar to those rendered to tenants in a city office building. They had exclusive control over admission to the premises, and they installed the seats on this balcony. Before doing so they should have made sure that seats could be placed there safely. They were the ones who invited the public to attend the spectacle, and the trial judge was right in treating them as inviters.

By reason of his having a bought ticket, these defendants owed to the plaintiff a higher duty than they would have owed to an ordinary invitee: *Brown v. B. and F. Theatres Limited*, [1947] S.C.R. 486 at 490, [1947] 3 D.L.R. 593; *Maclean v. Segar*, [1917] 2 K.B. 325 at 332. The fact that the plaintiff's ticket was paid for not by himself but by someone else makes no difference: *Union Estates Limited v. Kennedy et al.*, [1940] S.C.R. 625, [1940] 3 D.L.R. 404.

The trial judge found that any reasonable inspection would have disclosed the defects in the cable, and that the plaintiff did not know of the danger, and the evidence supports these findings.

Even if the appellants are to be considered mere licensees, and not occupiers, their duty is the same since by their invitation to the public generally, and their acceptance of money, they warranted the premises to be as safe as reasonable care and skill could make them: *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Limited*, 54 O.L.R. 174, [1923] 3 D.L.R. 308 (reversed 41 T.L.R. 21, [1924] 4 D.L.R. 1101); *Drinkwater v. Morand*, 64 O.L.R. 124, [1929] 4 D.L.R. 421; *Hayward v. Drury Lane Theatre Limited et al.*, [1917] 2 K.B. 899. Their duty in the circumstances was either to see that the balcony was safe or to warn spectators that they had not done so: *Bentley v. Vancouver Exhibition Association*, [1935] 3 W.W.R. 129, reversed 50 B.C.R. 343, [1936] 1 W.W.R. 480,

[1936] 2 D.L.R. 128; Charlesworth on Negligence, 2nd ed. 1947, pp. 207 *et seq.* and cases there cited; *Stewart v. Cobalt Curling and Skating Association* (1909), 19 O.L.R. 667; *Kimber v. Gas Light and Coke Company*, [1918] 1 K.B. 439 at 445. My claim lies both in contract and in tort.

As to damages, I concede that the amount of \$225 awarded for loss of salary cannot be supported. The \$4,000 for permanent disability, however, is entirely justified. The evidence is that the plaintiff cannot go back to either trucking or shoe-repairing, for which alone he had been qualified. In an appeal against the quantum of damages the appellant must show that the amount awarded is either shocking or unreasonable. The award must be considered in the light of present conditions.

We also appeal against the dismissal of the action against the Town of Goderich. We base our claim against the Town on the law as laid down in 23 Halsbury, 2nd ed. 1936, p. 582. The evidence shows that the Town made some repairs and that this cable had actually been supplied by the Town originally, although it was put up by a former operator of the rink.

*Cavalier v. Pope*, [1906] A.C. 428, is inapplicable here, because there the claim was based on contract, whereas our claim against the Town is based in tort. *Cavalier v. Pope* is also distinguishable on its facts.

The Town officials knew that this building would be used for public or semi-public purposes, and it was suitable only for operation as a rink. When they leased the building, which had been profitable to them, its condition was such that they knew it was dangerous to the public, and that Babb had no opportunity, after the execution of the lease, to go over the building and make it safe for the public. Leasing it to Babb in these circumstances was an act of negligence. The Town officials recognized their duty to make repairs, and did make some, even to the balcony. They should have gone further.

The cases read by the appellants' counsel show that Babb did not obtain exclusive possession from the Town (he was required, *e.g.*, to provide free skating for children). He was therefore a licensee rather than a lessee: *Sutcliffe v. Clients Investment Company, Limited*, [1924] 2 K.B. 746; *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74 at 95. I rely in this connection on the American cases cited by counsel for the appel-

lants, and also on *Kimber v. Gas Light and Coke Company*, *supra*; *Heaven v. Pender* (1883), 11 Q.B.D. 503 at 508-9; *Duncan v. Cammell Laird, Limited*, *supra*, at p. 627 ([1943] 2 All E.R.); *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 at 580, 583, 618. (Although this last case deals with chattels, it has been considered in connection with lands in: *Cunard et ux. v. Antifyre, Limited*, [1933] 1 K.B. 551, and *Booth v. The City of St. Catharines*, [1948] S.C.R. 564, [1948] 4 D.L.R. 686). In the *Booth* case Rand J., at p. 573, lays down the principle which should be applied here.

Our common law is a growing and developing body, and although a judgment against the Town in this case would involve going beyond established principles, this Court should not hesitate to do this.

*E. L. Haines, K.C. (L. E. Dancey, K.C., and J. J. Fitzpatrick, with him)*, for the Town of Goderich, defendant, respondent: *Cavalier v. Pope*, [1906] A.C. 428, merely enunciated the law that had been in force for generations, and that case has been followed since, both in England and in Canada. The leading authorities are collected in Williams, *Canadian Law of Landlord and Tenant*, 2nd ed. 1934, pp. 352-4; Salmond on Torts, 10th ed. 1945, pp. 500, 502; Clerk & Lindsell on The Law of Torts, 10th ed. 1947, pp. 657-8; Hill and Redman's *Law of Landlord and Tenant*, 10th ed. 1946, p. 178.

No additional duty is imposed on a landlord in Canada because of the nature of the premises: *Taylor v. The People's Loan and Savings Corporation*, [1930] S.C.R. 190, [1930] 2 D.L.R. 891; *Bentley v. Vancouver Exhibition Association*, 50 B.C.R. 343, [1936] 1 W.W.R. 480, [1936] 2 D.L.R. 128. The American decisions should not be followed, because they are so far from the law established in English and Canadian cases. The Restatement of the Law of Torts generally enunciates general propositions wholly different from and going far beyond anything laid down in Canadian cases, and is based on fundamental concepts wholly foreign to our jurisprudence. I also refer to Prosser on Torts, 1941, pp. 650 *et seq.* This logical system, sought by American writers, is what our Courts will not adopt: *Read v. J. Lyons & Company, Limited*, [1947] A.C. 156, [1946] 2 All E.R. 471 at 478. In England any such obligations as are imposed by the American Courts are imposed, if at all, by legislation: see Charlesworth on Negligence, 2nd ed. 1947, p. 179.



*M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562, cannot possibly have any application to this case. In *Otto v. Bolton*, [1936] 2 K.B. 46, the Court held that the *Donoghue* case could not apply to realty. Even if it could be extended, the doctrine of that case becomes inapplicable where there is an opportunity of inspection: *Buckner v. Ashby and Horner, Limited*, [1941] 1 K.B. 321; *Farr v. Butter Brothers and Company, Limited*, [1932] 2 K.B. 606.

*J. R. Cartwright, K.C.*, in reply: *Union Estates Limited v. Kennedy*, *supra*, applies only if the problem is being considered solely on the basis of tort. *Maclean v. Segar*, *supra*, though it is referred to in text-books on torts, is actually a case in contract. *Drinkwater v. Morand*, *supra*, is not authority for imposing liability on an invitor who is not an occupier. There is a suggestion of support for such an argument, but it is wholly *obiter*. The *Great Lakes Steamship Co.* case, in its final result, is not authority for this liability — it was decided in the Privy Council solely upon the basis of contract. The result is that on this point it stands as the decision of a single judge, who relied on *The Moorcock* (1889), 14 P.D. 64, and *The Bearn*, [1906] P. 48. *The Moorcock* appears to be a contract case, and it was followed in *The Bearn*, although the latter does go beyond contract. But both these cases are based on very special facts, and are an extension of the liability of an owner *qua* invitor. They do not furnish any ground here for extending the liability to my clients, because my whole contention is that we were not occupiers.

The only positive act of negligence charged against us is the placing of the benches in the balcony. But the plaintiff himself says in evidence that these benches were stronger than those that had been there before, and there is no evidence that the benches themselves were dangerous. Placing them as we did in relation to the cable could be negligent only if we were under a duty to inspect the balcony or the cable.

*Frank Donnelly, K.C.*, in reply as to his appeal.

*Cur. adv. vult.*

9th June 1949. The judgment of the Court was delivered by

AYLESWORTH J.A.:—This is an appeal from the judgment of Mackay J. dated 29th July 1948, awarding the plaintiff MacDonald \$4,895.51 damages, together with costs of the action,

against the defendants Babb, Louzon, Westbrook, Doak and Paquette, and dismissing the action without costs as against the defendant the Corporation of the Town of Goderich. The defendants Louzon, Westbrook, Doak and Paquette, whom I will call "Louzon et al.", seek dismissal of the action against them also and alternatively they attack the quantum of damages. The plaintiff supports the judgment against these last-mentioned defendants and cross-appeals against dismissal of the action as against the defendant Corporation. The defendant Babb did not appeal and the judgment, therefore, stands as against him in any event.

On the 6th January 1947 the plaintiff was accidentally injured in premises owned by the defendant Corporation in the town of Goderich and known as "the skating rink". In addition to dealing with the precise circumstances surrounding the injury, it is desirable to review in chronological order and in some detail certain other facts and also to consider certain findings of fact made by the learned trial judge, as much turns upon the legal relationship and prior activities of the various parties.

The building known as the skating rink has been owned by the defendant Corporation for ten years or more and consists in part of a large frame building with an area for ice and with accommodation for spectators at the east and west ends of such area and in a balcony along the northerly side of the building extending above part of the ice surface. The balcony is about 10 feet above the ice and on the balcony's southerly side and at heights from the floor of approximately 3 and 4½ feet respectively are horizontal lower and upper steel cables, the purpose of which is to prevent spectators from falling from the balcony. These cables are attached by metal clamps to iron rods extending from the roof of the rink to the floor of the balcony for the purpose of additional support. The cables have been installed in their present position for over ten years and are rusted and rotten; their deteriorated condition was obvious to anyone capable of making, and who made, a proper inspection but, as one witness puts it, they "looked substantial" and their defective condition was not apparent to the naked eye except upon a close examination. The building had been used as a public skating rink during the years it was owned by the defendant Corpora-

tion and, indeed, for longer than that. Games of hockey were frequently played therein.

On or about 15th November 1946 the defendant Babb entered into a lease with the defendant Corporation whereby the skating rink was leased to him for the period from 15th November 1946 to 15th October 1947. The lease contains a covenant on the part of the lessee to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted. It is further provided by the lease "that the Lessee will provide free skating for children three afternoons in each week, and in the event of the Lessee failing to make such provision that the Lessor may terminate this Lease without notice".

On 15th November 1946 the defendant Babb requested the council of the defendant Corporation to make certain repairs to the rink and at a meeting of council on 6th December 1946 he furnished council with a statement of the repairs so requested. As a result, the council, as a committee of the whole, attended the skating rink, inspected the premises, and authorized certain specific repairs thereto, which were carried out on their behalf. Neither the repairs requested by Babb nor repairs actually carried out on behalf of the defendant Corporation included any repairs to the cables. No real inspection of the cables was made on behalf of the Corporation or by Babb, or, so far as appears in the evidence, by any of the appellants Louzon et al., at any time before the accident. The learned trial judge has found as a fact that such repairs as were made were effected after execution of the lease.

Some time before 6th January 1947 Louzon et al. entered into an oral agreement with the defendant Babb whereby a hockey team sponsored by them was to play certain hockey games in the rink. The whole of the proceeds from these games was to belong to Louzon et al. and they agreed to pay to Babb the sum of \$50 for each game played. Babb agreed to supply the building, ice and hydro-electric power, to clean the ice between periods in the game, to permit the hockey team three practice periods per week in the rink without further charge and to be on hand during the progress of the games so as to make himself available for such further service as might then be required of him by Louzon et al. The last-mentioned defendants



looked after the sale of tickets for the games and were responsible for seating the spectators.

Pursuant to the arrangements above described, Louzon et al. advertised a hockey game to be played on 6th January 1947, in which game the hockey team managed and operated by them was to take part. The advertisement stated the price of admission and gave notice that upon payment of an additional fee a reserved seat could be obtained. These reserved seats were on the balcony on benches or planks placed there by Louzon et al. In previous years the balcony had been used by spectators who paid the general price of admission, but, as I have said, the actual benches used on the balcony on 6th January 1947 by those who had paid the additional fee for reserved seats had been placed there by Louzon et al. The idea of using the balcony for reserved seats, and of making an additional charge therefor, originated with and was carried out by Louzon et al. This arrangement was available to patrons for the first time at the game played on 6th January 1947; there were no seats on the balcony made available as such at any time earlier in the hockey season. The reserved seating capacity of the balcony was in the vicinity of 95 to 100 persons.

Pursuant to the advertisement the plaintiff attended at the rink on 6th January 1947, was admitted as a spectator upon payment of the advertised price of admission, and, upon payment of an additional fee, he, and certain of his friends, were ushered to seats on the balcony allotted to them by Louzon et al. or their servants. The plaintiff did not himself purchase the general admission ticket or the reserved accommodation; this was done by his sister. The plaintiff apparently repaid the price of his admission and seating accommodation to his sister, who in turn handed the money back to the plaintiff's wife.

During the second period of the hockey game a scrimmage took place on the ice under, or nearly under, the balcony. The plaintiff leaned forward in watching the game with his hand resting upon the lower cable. The cable broke, precipitating him, along with several others, to the ice below, and he sustained relatively serious injuries. Examination shortly after the accident disclosed that the lower cable was broken at one of the up-rights and that strands of the cable were broken at several places. The cable consisted of seven strands and in some places as many

as three of these, and in one place four, were altogether missing or were broken.

The learned trial judge has found that the plaintiff was not himself guilty of any negligence, that he was not bound to look out for such unexpected danger as proved to be actually present, that the defects in the cable were of such a nature that they could be seen by a proper inspection and that the condition of the cable constituted a dangerous condition and a trap. He also found that at all material times on the said 6th January the operation of the rink, so far as spectators in attendance at the hockey game were concerned, was under the supervision, regulation and control of Louzon et al. jointly with Babb and the plaintiff was the invitee of Louzon et al. and of Babb. With these findings of fact I respectfully agree.

Turning now to a consideration of the legal results which follow from the facts, it is convenient first to deal with the claim against the defendant Corporation. In Salmond's Law of Torts, 10th ed. 1945, the following principles are enunciated at pp. 500, 502:

"Apart from any express contract to that effect, a landlord owes no duty, either towards his tenant or towards any other person who enters on the premises during the tenancy, to take care that the premises are safe either at the commencement of the tenancy or during its continuance."

"The landlord's exemption from liability for dangers existing on premises in the occupation of his tenant extends not merely to injuries suffered by the tenant himself, but to those suffered by other persons entering on the premises during the tenancy. The lease transfers all obligations towards such persons from the landlord to the tenant.

"This is so even if the landlord has by contract with the tenant taken upon himself the duty of keeping the premises in repair. Such a contract is *res inter alios acta*, and confers upon strangers no rights against the landlord which they would not have had without it."

Similar statements are to be found in the current editions of other leading texts and the principal authorities are conveniently collected in Williams, Canadian Law of Landlord and Tenant, 2nd ed. 1934, p. 352. As to the authorities themselves, reference need only be made to *Robbins v. Jones* (1863), 15

C.B.N.S. 221, 143 E.R. 768; *Lane v. Cox*, [1897] 1 Q.B. 415; *Cavalier v. Pope*, [1906] A.C. 428; and *Taylor v. The People's Loan and Savings Corporation*, [1930] S.C.R. 190, [1930] 2 D.L.R. 891.

American jurisprudence upon this subject obviously has developed along somewhat different lines; there the general rule appears to be qualified in the case of certain buildings as illustrated in *Martin et al. v. City of Asbury Park* (1933), 168 A. 612 at 613:

"The true rule undoubtedly is that where an owner designs and devotes a building to public or semipublic use, the public is deemed to be invited to make such use thereof by the owner and the latter cannot evade responsibility of exercising due care to make it reasonably safe by demising it to a tenant."

Without seriously considering whether or not in the case at bar the lease by the defendant Corporation to Babb of the premises "known as the skating rink and to be used as such" would be sufficient to invoke the American rule as to "such use" by the public, when the instant "use" by the plaintiff was that of a spectator at a hockey game, the law applicable in this Province clearly exonerates the defendant Corporation. The appeal as to it will therefore be dismissed with costs.

As to the liability of Louzon et al., their counsel urge that they were not the occupants of the rink in the sense of that expression as used in the authorities, but that they were merely licensees of Babb, and as such owed no duty to the plaintiff. The real occupant, they say, was Babb and therefore Louzon et al. incurred no liability by reason of the invitation extended by them to the plaintiff.

In *Duncan v. Cammell Laird, Limited et al.*; *Craven v. Same*; *Duncan v. Wailes Dove Bitumastic, Limited*; *Craven v. Same*, 171 L.T. 186, [1943] 2 All E.R. 621, Wrottesley J. describes the crucial test of liability as follows, at p. 190:

". . . it has not been possible to find authority for the proposition that a person not in control at the moment of the accident can nevertheless be said to invite persons on to premises. . . . Ordinarily, of course, the invitation is extended by the occupier of the property, whether fixed or movable, where the damage is caused. But is this essential? It seems to me that the importance of establishing that the defendant who in-



vites is the occupier of the premises lies in the fact that with occupation goes control. The importance of control is that it affords the opportunity to know that the plaintiff is coming on to the premises, to know the premises, and to become aware of dangers whether concealed or not, and to remedy them, or at least to warn those that are invited on to the premises."

In the Court of Appeal, 171 L.T. at 191, [1944] 2 All E.R. 159, his decision was reversed but upon an entirely different ground not here in point, and each of the three lords justices expressly refrained from discussing or passing upon Wrottesley J.'s statement, holding that it was unnecessary to do so. Similarly, in the further appeal to the House of Lords, *sub nom. Woods v. Duncan et al.*; *Duncan et al. v. Hambrook et al.*, [1946] A.C. 401, the judgments proceed upon other grounds.

In the earlier case of *Humphreys v. Dreamland (Margate), Ltd.* (1930), 100 L.J.K.B. 137, the House of Lords was called upon to consider the question of liability based upon invitation or control. In that case one Schmidt, by agreement with the respondent company, operated a machine called "The Atlantic Flyer" upon respondent's premises. The appellant's son had bought a ticket for a ride on this machine and was killed as a result of a defect therein. The agreement between Schmidt and the respondent was such as to leave uncertain the precise legal relationship between them, which was either that of landlord and tenant or that of licensor and licensee. The respondent had issued invitations to the public to come to "Dreamland", as the area of land owned by it was called, but it was held that these invitations did not extend to entering upon the "concession" run by Schmidt upon part of such premises, although the agreement with Schmidt stipulated that the respondent should participate in the profits from the operation of the machine. At the trial judgment was awarded against Schmidt but the action was dismissed against Dreamland Ltd. Their Lordships, in their dismissal of the appeal against the dismissal of the action against Dreamland (Margate), Ltd., unanimously held that the respondent was not liable as an invitor since the invitations issued by the respondent were not invitations to enter the particular machine. Two of the learned law lords, however, also held that the respondent could not be held liable because it was not the real occupant of the premises relative to the operation of the machine.

Lord Buckmaster rejected the argument that the respondents were in control in the following language, at p. 139: "But so far as issuing the tickets are concerned, or refusing admittance to the show as apart from the grounds, that rests with the concessionaire [Schmidt]. Subject to innumerable restrictions as to the way in which he is to use the ground allotted for his show, the control of the show itself is in his hands."

After dealing with the extent of the invitation issued by the respondent and holding that such invitation could not be construed as an invitation to enter the show itself, he disposed of the appeal, in so far as it was based on liability in tort, as follows: "If this be so, the action based upon the view that there was an invitation to property on which there was a hidden danger under the control of the inviter, fails . . ."

In the judgment of Lord Warrington of Clyffe, at p. 140, appears the following passage: "There was much discussion in the course of the argument on the question whether the agreement constituted the relation of lessor and lessee between the parties. Without for a moment saying I disagree with those who thought that it did, my own view is that it does not matter; it is enough for this purpose if it gave to Schmidt the right to the possession of the land on which the machine stood and the right to exclude therefrom all except those who came there by his express invitation. . . . In my opinion the only conclusion that can be drawn is that, whether or not the technical relation of lessor or lessee was created, it was the concessionaire alone who had the right to invite customers to make use of his machine, and that the respondents neither had the right in law, nor did in fact invite the deceased man to incur the risk resulting in his death."

Lord Tomlin felt that the relationship of lessor and lessee existed between the respondent and Schmidt and that the respondent had no legal right to extend, and in fact did not extend, an invitation which included entry to the Atlantic Flyer. The machine, he felt, was not in the occupation of the respondent and the real occupant thereof was Schmidt in whom alone reposed the right to issue an invitation to enter the Flyer.

In *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Limited* (1922), 52 O.L.R. 222, Middleton J., as he then was, held that an elevator company which owned a wharf on a Government

harbour and which had agreed with the owners of a vessel to have it placed at the wharf for the discharge of its cargo, was liable to the owners of the vessel for damage thereto by reason of disrepair in the harbour bed although such disrepair was unknown to the elevator company. In so holding, he applied the statement of Bowen L.J. in *The Moorcock* (1889), 14 P.D. 64 as quoted in *The Bearn*, [1906] P. 48:

"They, at all events, imply that they have taken reasonable care to see whether the berth, which is an essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so."

The Appellate Division, 54 O.L.R. 174, [1923] 3 D.L.R. 308, reversed the judgment of Middleton J., Hodgins J.A. dissenting. The majority in the Court of Appeal attempted to distinguish the case relied upon by Middleton J., holding that there was no such duty cast upon the respondents as had been found by the trial judge and holding also that in the claim as founded upon breach of contract the damage was too remote to be recoverable.

In the Privy Council, 41 T.L.R. 21, [1924] 4 D.L.R. 1101, Lord Carson, in delivering their Lordships' judgment, restored the judgment at trial, expressly founding his judgment, however, upon the claim for damages arising from breach of contract. His judgment, at p. 23, deals with the ground upon which Middleton J. had held for the plaintiff, as follows: "Having come to this conclusion upon the contract and the subsequent facts, their Lordships do not think it essential to examine the case from the point of view upon which it was decided by the learned Trial Judge, but their Lordships must not be taken as holding that they dissent in any wise from the views of the learned Trial Judge or that they desire to throw any doubt upon the soundness or the applicability of the decision in the *Moorcock* case."

In *Drinkwater v. Morand*, 64 O.L.R. 124, [1929] 4 D.L.R. 421, the Appellate Division applied the principle of liability enunciated by Middleton J. in *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Limited*, *supra*. Middleton J.A. wrote a judgment which was concurred in by Mulock C.J.O. and Magee J.A.; Rose J., sitting *ad hoc*, agreed in the result. I quote from the judgment of Middleton J.A. at p. 128: "The principle thus established is that those who invite another to use the property of



a third person or of a public body impliedly warrant that the place to be used is safe for the purposes indicated, and the invitation imposes a duty upon those who invite, to make sure that it is fit for the purposes suggested."

While it is true that upon the facts in *Drinkwalter v. Morand* the Appellate Division held that the boy was not at the place where he came to his death at the invitation of the appellant, yet the judgment may be regarded as a direct, although *obiter*, expression of approval of the principle laid down at the trial in *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Limited*.

It is to be observed that in *The Moorcock*, *The Bearn*, and the *Great Lakes Steamship Co.* case, *supra*, the invitor had the right to issue an invitation to those having business with the invitor to come upon the premises of another as to which premises the invitor had no authority, control or right of possession, and that these cases decided that in such circumstances the invitor bears the obligation either to take reasonable care that the premises of that other are safe or to warn the invitee that the invitor has not done so. Presumably the invitor is excused from warning against a specific danger in the premises of another by reason of the fact that, lacking authority or control over or right of possession to those premises, he may be unable to ascertain, even by the exercise of reasonable care, whether or not any danger therein exists. The invitor in each of these cases was a wharfinger occupying premises for the use of which entry upon the premises of a third party was essential. Again in the *Drinkwalter* case, *supra*, the invitor was in occupation or control of premises contiguous to public premises and dependent in some degree as to their use upon the enjoyment of such public premises.

I express no opinion as to the precise scope of the doctrine exemplified by these four last-mentioned cases; in the case at bar the facts as I view them do not require me to do so. I think *Louzon et al.* were in sufficient occupation, possession and control of the premises to have the legal right, which they exercised, of inviting the plaintiff thereon and that upon them was imposed a corresponding duty to the plaintiff to take reasonable care to see that the premises were safe or to warn the plaintiff of the existing danger which the exercise of reasonable care on their part would have disclosed to them. Clearly upon the evidence

they did not discharge their duty to the plaintiff and their appeal upon the question of liability must fail.

There remains the question of quantum. In my view, the evidence, save as to one item allowed by the learned trial judge, fully supports the assessment of damages as arrived at by him and, save as to that one item, I would not interfere. An allowance, however, was made to the plaintiff in the sum of \$225 by the learned trial judge as follows: "In view of the fact that the plaintiff used his sick leave with the Department of Veterans Affairs during the two months he was off duty I am of opinion that a proper assessment is that the plaintiff is entitled to 50 per cent. of such loss of time, namely \$225."

In the circumstances as detailed in the evidence, it was admitted by counsel on the argument of the appeal that this item was not properly assessable in favour of the plaintiff, and accordingly it should be disallowed as being too remote upon the evidence before us.

The judgment as against the defendants Louzon et al. will accordingly be varied by reducing the amount awarded to the plaintiff by the sum of \$225. Subject to this variation, the appeal of the defendants Louzon et al. will be dismissed with costs.

*Appeal dismissed with costs, subject to a variation in the damages.*

*Solicitor for the defendants Louzon, Westbrook, Doak and Paquette, appellants: R. C. Hays, Goderich.*

*Solicitor for the plaintiff, respondent and appellant: Frank Donnelly, Goderich.*

*Solicitor for the Town of Goderich, defendant, respondent: L. E. Dancey, Goderich.*

## [COURT OF APPEAL.]

**The Village of Delhi v. Imperial Leaf Tobacco Company of Canada Limited.**

*Taxation—Municipal Assessments—Appeals by Stated Case to Court of Appeal—Questions Proper to be Stated—Jurisdiction of Court of Appeal—Questions of Law—The Assessment Act, R.S.O. 1937, c. 272, s. 85.*

*Taxation—Municipal Business Assessment—Assessment as “manufacturer”—Appeals—What Questions Open in Court of Appeal—The Assessment Act, R.S.O. 1937, c. 272, s. 8(1).*

The respondent was assessed for business tax as a manufacturer under s. 8(1)(e) of The Assessment Act, but on appeal this assessment was changed by the County Judge to one under s. 8(1)(k). At the request of the appellant the County Judge stated a case under s. 85 of the Act, in which, after stating the facts and his decision, he asked: (1) Was the respondent assessable as a manufacturer under s. 8(1)(e)? (2) Was it assessable as a wholesale merchant under s. 8(1)(c)? (3) Was it assessable under s. 8(1)(k)? The statement of these three questions was preceded by the words: “Upon the facts above stated and upon a true construction of The Assessment Act”.

*Held*, the appeal must be dismissed; the first and second questions should be answered “no” and the third question should be answered “yes”.

*Per* ROBERTSON C.J.O.: The questions submitted by the County Judge were those to which the Court must look to see what it was required to answer, and the question whether or not the appeal was within the Court’s jurisdiction depended upon those questions, read in the light of what was contained in the special case. It was not open to the Court to propound to itself some other question and to determine its jurisdiction by the character of that other question. It was confined to the special case which, if it did not contain what was essential, might be sent back for amendment. The special case here was sufficient, and the questions submitted were within the jurisdiction of the Court under s. 85(1). Having regard to the arguments submitted, those questions could be answered only upon a proper construction of the statute, and possibly involved other questions of law.

*Per* ROACH J.A.: The County Judge’s conclusion that the respondent fell within a particular category mentioned in s. 8(1) of the Act was a conclusion of fact, but it might depend upon a question of law, and if it did there was a right of appeal to the Court. To decide the present case, the Court must know judicially what constituted the business of a manufacturer or that of a wholesale merchant. *Re Hiram Walker & Sons Limited and Town of Walkerville* (1917), 40 O.L.R. 154; *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78; *Re The City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, discussed. From what was said in *Rogers-Majestic Corporation Limited v. The City of Toronto*, [1943] S.C.R. 440 at 447-8, and *Commissioners of Inland Revenue v. Lysaght*, [1928] A.C. 234 at 243, it was manifest that two questions of law always arose in such appeals as this. The first question involved the construction of the statute, and the second question was whether there was any evidence to support the County Judge’s decision that the taxpayer fell within a particular category. In this case, since the appellant did not attack, but adopted, the County Judge’s definition of “manufacture” (based upon *In re H. Robinson Corporation Limited* (1937), 19 C.B.R. 22 at 30, and *McNicol et al. v. Pinch*, [1906] 2 K.B. 352), the only question of law that arose was whether or not there was evidence to support the County Judge’s classification of the respondent’s business. Since there was no evidence on which that business could reasonably have been put within any of the classifications specifically



named in s. 8(1), it followed that he had been right to place it within the "omnibus" clause, s. 8(1)(k).

*Per* AYLESWORTH J.A.: *Quaere*, whether, on a proper construction of subss. 2 and 7 of s. 85, a respondent who has been a party to the stating of a case is entitled to question the propriety of the questions submitted.

AN APPEAL by stated case from the judgment of Brickenden Co. Ct. J., of the County Court of the County of Norfolk, allowing an appeal from a court of revision and reducing the respondent's assessment for business tax. The stated case was as follows:

"I. THE FACTS.

"Imperial Leaf Tobacco Company of Canada Limited (hereinafter referred to as Imperial Leaf) is a corporation with share capital and owns property at the Village of Delhi.

"For the year 1948 the Assessor for the Village of Delhi assessed the lands of Imperial Leaf at Delhi at \$3,750 and its buildings at \$467,890 or a total assessment of \$471,640. In addition to this the Assessor assessed the Company for business assessment as a manufacturer on the basis of 60% of the combined land and buildings assessment.

"Imperial Leaf does not question the assessed value of its lands and buildings but does object to the business assessment. Imperial Leaf claims that it is not a manufacturer within the meaning of Section 8(1)(e) of the Assessment Act, and accordingly that its business assessment should be only 25% under Section 8(1)(k) of the Assessment Act instead of 60% as a manufacturer.

"The Court of Revision for the County of Norfolk on the appeal by Imperial Leaf held that Imperial Leaf was a manufacturer and that the business assessment of 60% on lands and buildings was correct and consequently affirmed the assessment.

"Imperial Leaf thereupon appealed from the Court of Revision to me and the appeal came on for hearing before me at the Village of Delhi on the 3rd day of March, 1948.

"From the evidence adduced before me, I find the facts to be as follows:

"Imperial Leaf owns and operates three plants at Delhi, Leamington and Aylmer. Substantially the same operations are carried on at each of these plants.

"Imperial Leaf is licensed under The Excise Act only as a tobacco packer, and consequently is prohibited from carrying

on operations which are defined in The Excise Act as the manufacture of tobacco.

"Imperial Leaf has for many years carried on the business of buying, grading and packing tobacco at Delhi in extensive premises containing mechanical equipment of some size and complexity, which is used for the purpose of its business. It purchases tobacco from growers whose farms lie in a fairly wide radius about the Village of Delhi and directs these growers when to ship their tobacco into the Company's plant at Delhi. When brought in by the growers to the Company's plant, the tobacco is not fit for use as cigarette, pipe or plug tobacco although it has already been passed through the operation on the farm known as 'flue-curing' in which the tobacco has been subjected to some heat applied to the leaves hung or suspended in barns in bundles of 18-25 leaves tied together at the butt, which bundles are called 'hands'. These hands are bundled into bales for shipment. On arrival at the plant of the Company, the tobacco bales receive a preliminary grading and are stored in a basement at a temperature of 68° F. and humidity at 70% for two or three days. Some further grading is then done, the bales are broken down to individual hands and the dirt and loose particles are shaken from the hands. Then the moisture content in the leaves is equalized to fixed standards to ensure proper storage, by putting the hands through what is called a 're-dryer'. The re-dryer is an enclosed series of chambers about 140' in length. The tobacco which is still in the hands is suspended from metal sticks on a continuous belt which traverses the re-dryer from one end to the other in approximately fifty-two minutes. The racks pass through a series of heat chambers with varying temperatures up to approximately 200° F., to remove all moisture from the tobacco and then through a further chamber where the proper moisture content is restored by the application of moisture impregnated hot air. The hands are then packed into hogsheads, moisture tests are made on every tenth hogshead, and they are stored until required to be shipped. The period of storage varies from one to four years depending on the supply of and the demand for particular grades and types of tobacco. Nothing is added to the tobacco nor is its character or form changed before leaving the possession of Imperial Leaf, except for such variation from the original moisture content as may

have been affected in the course of equalizing moisture content. At this stage the tobacco is not yet ready for use in cigars, pipes or cigarettes.

“Evidence was given before me, and I accept it, that if tobacco were grown and stored by the grower under ideal conditions, moisture equalization would not be necessary, and that the same result as is achieved by the drying and remoistening process could be accomplished by keeping tobacco for sufficient length of time in an open room subject to fixed conditions of temperature and humidity.

“The operations carried on by Imperial Leaf are similar to those carried on by Canadian Tobacco Co. Ltd., as referred to in *Canadian Leaf Tobacco Co. Ltd. v. City of Chatham*, [1944] 4 D.L.R. 145 [[1944] O.R. 458], in that a re-dryer was used in both places.

“All tobacco handled by Imperial Leaf is shipped in hogsheads to the factories of Imperial Tobacco Company of Canada Limited (hereinafter called Imperial Tobacco), or its subsidiary companies, or to other buyers, all as designated by Imperial Tobacco.

“All shares of the capital stock of Imperial Leaf Tobacco Company of Canada Limited are owned or controlled by Imperial Tobacco Company of Canada Limited.

“All funds required from time to time by Imperial Leaf for the purchase of leaf tobacco, payment of salaries, etc., are advanced by Imperial Tobacco, and as and when leaf tobacco is shipped to or to the order of Imperial Tobacco, that company credits the advance account of Imperial Leaf with an amount which is calculated in every case to give a profit to Imperial Leaf. Imperial Leaf in turn charges in its books a corresponding amount to the account of Imperial Tobacco. By this means the accounting records of the two companies in respect of these transactions and the financial relationship between them are reflected in the respective books of the two companies and maintained in agreement.

“On or about the 8th day of April, 1937, the Council of the Corporation of the Village of Delhi passed By-law No. 316 fixing at \$295,000 the assessment of Imperial Leaf in the Village of Delhi for a period of ten years. A copy of this By-law is attached as Schedule ‘A’ to this Stated Case. The fixed assess-



ment of \$295,000 granted by this By-law was enjoyed by Imperial Leaf for a ten-year period, as provided in the By-law.

"II. DECISION.

"For considerations which are set out in my reasons for allowing the appeal, which reasons I include as Schedule 'B' hereto, I found on the facts above stated that the business carried on by Imperial Leaf was not that of a manufacturer, and I accordingly allowed the appeal and reduced the business assessment from 60% to 25% of the assessed value.

"III. QUESTIONS.

"At the hearing I was requested by counsel for the Corporation of the Village of Delhi to note certain questions and to state a case for the Court of Appeal. The following questions are accordingly submitted:

"Upon the facts above stated and upon a true construction of the Assessment Act,

"1. Is the Imperial Leaf Tobacco Company of Canada Limited liable to business assessment as a manufacturer under Section 8(1)(e) of the Assessment Act?

"2. Is the said Company liable to business assessment as a wholesale merchant under Section 8(1)(c) of the Assessment Act?

"3. Is the said Company liable to business assessment under Section 8(1)(k) of the Assessment Act?"

The reasons of the County Judge were in part as follows:

"The only point at issue in this appeal is whether the appellant should properly be classified as a person carrying on the business of a manufacturer and thus be liable to a 60 per cent. assessment under s. 8(1)(e) of The Assessment Act, R.S.O. 1937, c. 272.

"It was suggested, but not seriously argued, on behalf of the respondent, that the appellant might properly be classified and taxed as a wholesale merchant, but no evidence was adduced which would support such a contention, and I have no hesitation in finding that the appellant should not be classified as a wholesale merchant.

"[His Honour here reviews the operations at the plant, pointing out that the moisture equalization operation is apparently a continuation of the drying started in the grower's barn, and proceeds:] It then falls to be decided whether the operations I have

described constitute the appellant a manufacturer within the meaning of The Assessment Act.

“No attempt is made in The Assessment Act to define what constitutes a manufacturer or the business of manufacturing, and I have not been able to find any reported decision in which the term manufacturing, as used in this Act, has been judicially interpreted. In my opinion, it accordingly must be determined as a question of fact whether or not the activities of a taxpayer constitute manufacturing in the ordinarily accepted sense of that term.

“I do not think the matter is determined by the definitions in The Excise Act, 1934 (Dom.), c. 52, and the regulations thereunder, upon which counsel for the appellant strongly relied. I am equally of opinion that the inclusion of tobacco driers (along with grain elevators and coal-storage plants) among businesses which may be deemed to be manufacturing businesses for the purposes of s. 405(1) of The Municipal Act, R.S.O. 1937, c. 266, which was relied on by counsel for the respondent, does not settle the problem whether what is done in the appellant's premises constitutes manufacturing. I do not think the matter is advanced by the circumstance that in 1937 the respondent saw fit to enact a by-law granting the appellant a fixed assessment for ten years, pursuant to the authority of legislation which is now embodied in s. 405(1).

“The respondent also placed considerable reliance upon a decision of the Court of Appeal for Ontario in *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 4 D.L.R. 145, as determining that a business very similar to that carried on by this appellant was manufacturing. A careful reading of that case indicates that it embodies no judicial determination as to whether the taxpayer was a manufacturer. In the circumstances of the appeal that issue was not open to the appellant, and the only point determined by the Court was that separate premises used by the appellant in its business, but purely for storage purposes, must be subject to business assessment in accordance with the general business of the appellant, which had been determined as to its main premises by the court of revision, and in respect of which no appeal had been taken.

“I think the word ‘manufacturer’ should be interpreted in its natural and ordinary sense: Maxwell on The Interpretation

of Statutes, 9th ed. 1946, pp. 1-2. The natural and ordinary sense of the word 'manufacture' is given in Murray's New English Dictionary as: 'to work up (material) into forms suitable for use'. Webster's 20th Century Dictionary similarly defines it as: '(1) The operation of making goods or wares, as cloth, utensils, paper, books and whatever is used by man; the operation of reducing raw materials of any kind into a form suitable for use, by the hands or by machinery. (2) Anything made from raw materials by the hands, by machinery, or by art, as clothes, iron utensils, shoes, cabinet work, saddlery, etc.' The same dictionary defines a manufacturer as 'one who works raw materials into wares suitable for use'.

"In *Rex v. Sutherland*, 42 B.C.R. 367, [1930] 2 W.W.R. 244, [1930] 4 D.L.R. 183, 54 C.C.C. 313, it was said that: '. . . a modern conception of a manufacturer is one who on a reasonably large scale turns out a finished or partly finished product by the application of labour or mechanical power for general use.'

"Similarly, in *In re H. Robinson Corporation Limited; The King v. Martin* (1937), 19 C.B.R. 22 at 30, affirmed [1938] O.W.N. 243, 19 C.B.R. 246, it was said: 'First, what is a manufacturer? There is no definition of the word "manufacturer" in the Act and it is practically impossible to find a definition which will be absolutely accurate, but from all the definitions contained in leading dictionaries, Corpus Juris, Encyclopaedias, etc., the Court gathers that to manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations, whether by hand or machinery.'

"In *McNicol et al. v. Pinch*, [1906] 2 K.B. 352, Darling J. said: 'I think the essence of making or manufacturing is that what is made shall be a different thing from that out of which it is made.'

"Applying the tests and concepts suggested by the quoted definitions, which I find to be in accord with what I regard as the popular or generally understood meaning of 'manufacture', I find that what is done at the appellant's premises does not constitute manufacturing. The appellant does not 'make' anything in the popular sense of the word. The leaf of tobacco



delivered by it is the same leaf that it originally received, unchanged in form, character and content, except for such variation from the moisture content of tobacco as delivered as may have been effected in the course of equalizing moisture content. That this moisture equalization result is achieved, or rather accelerated, by the use of apparatus of some size and complexity does not, in my opinion, change the essential character of the business.

“I find that the appellant does not carry on the business of a manufacturer. The appeal is therefore allowed and the appellant’s business assessment is fixed at 25 per cent. of the assessed value of its lands and buildings, pursuant to s. 8(1)(k) of The Assessment Act.”

7th December 1948. The appeal was heard by ROBERTSON C.J.O. and ROACH and AYLESWORTH JJ.A.

*W. P. Mackay, K.C.*, for the appellant: The whole question is whether the respondent’s activities make it a manufacturer, and hence assessable under s. 8(1)(e) of The Assessment Act, R.S.O. 1937, c. 272, or whether, as the trial judge has found, it should be assessed under s. 8(1)(k). We submit alternatively that if it is not a manufacturer, within the meaning of the statute, it is a wholesale merchant.

This company takes the raw leaf, grades it, puts it through machinery for drying, then moistens it by steam to get a uniform moisture content. This is a process in the manufacturing of the tobacco — something is done to it that was not done before. [AYLESWORTH J.A.: Could you not then say that the leaf as delivered by the farmer is not the same as when it is picked, because it has been flue-cured?] The leaf that the company receives is not in the same form as what it subsequently ships. The uniform moisture content is not found in nature, and the company works on raw material and produces something different, which brings it within dictionary definitions of “manufacturer”: *King v. Freeman*, [1942] O.R. 561, [1942] 4 D.L.R. 182. There is a chemical change: *Hiram Walker & Sons Limited v. The Town of Walkerville*, [1933] S.C.R. 247 at 249, [1933] 3 D.L.R. 433.

The trial judge should have followed the decision of this Court in *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 4 D.L.R. 145. [ROBERTSON C.J.O.:

The Court did not decide in that case that the company was a manufacturer, but merely, its status as a manufacturer being established, that the premises in question were occupied in connection with its manufacturing business.] The case stands for the proposition that this same company is a manufacturer, and it is estopped from denying the fact: *Hoystead et al. v. Commissioner of Taxation*, [1926] A.C. 155. [AYLESWORTH J.A.: How can there be any estoppel or binding effect as against a different party, and in respect of different premises?] The decision, even if it is not binding in this case, is at least of considerable importance.

Another feature of this case lies in the relationship between the respondent company and the parent company, Imperial Tobacco Company of Canada Limited. All the funds of "Imperial Leaf" are advanced by "Imperial Tobacco". According to *The Palmolive Manufacturing Company (Ontario) Limited v. The King; The King v. Colgate - Palmolive - Peet Company, Limited*, [1933] S.C.R. 131, [1933] 2 D.L.R. 81, we can go behind the corporate facade to see the true picture. We may establish that one company acts only for another. Imperial Leaf is in reality merely a department or branch of Imperial Tobacco. The business of the principal is that of the agent, and Imperial Tobacco is clearly a manufacturer. [ROBERTSON C.J.O.: Suppose a large department store, like "Eaton's", had a factory in Brampton. Surely that factory would not be assessed as a department store. You must look to what is within a particular municipality.] It is true that the principle would lead to difficulties if there were many subsidiaries, but here there are only two companies, as in the *Palmolive* case. All shares in Imperial Leaf are owned or controlled by Imperial Tobacco, and it finances the respondent.

The respondent accepted a fixed assessment under s. 405(1) of The Municipal Act, R.S.O. 1937, c. 266, which expressly includes "tobacco drier" under the heading of "any manufacturing business". This is a legislative definition of a tobacco drier as a manufacturer. [AYLESWORTH J.A.: Might it not be argued that because the Legislature has thought fit to mention a tobacco drier specifically, that impliedly recognizes the fact that ordinarily it would not be thought to come within that category?] Surely the company cannot take the benefit of something re-

served for manufacturers under The Municipal Act, and then say, for purposes of another statute, that it is not a manufacturer. It would be grossly unfair to allow the respondent a partial exemption as a manufacturer, and also permit it to claim another exemption because it is not a manufacturer. [AYLESWORTH J.A.: On a broad view, is it not a mutual benefit that is conferred under that section of The Municipal Act?] The respondent, having had the benefit of being classified as a manufacturer for one purpose, is estopped from denying now that it is a manufacturer: *Cave v. Mills* (1862), 7 H. & N. 913, 158 E.R. 740. [ROBERTSON C.J.O.: This argument assumes that the word "manufacturer" in s. 8(1)(k) of The Assessment Act and the words "manufacturing business" in s. 405(1) of The Municipal Act are used with the same meaning.] The statutes are *in pari materia*. [ROBERTSON C.J.O.: But the words in s. 405(1) of The Municipal Act are clearly applicable to that section only. The language is not even the same in the two sections.] Since s. 405(1) deals with assessment, it should be read in conjunction with the provisions of The Assessment Act.

*G. D. Watson, K.C.*, for the respondent: There is a right of appeal to this Court, under s. 85(1) of The Assessment Act, only on a question of law, and there is here no question of law, but only a question of fact, which has been decided in our favour by the County Judge. His findings of fact cannot be overruled here, and this Court has no jurisdiction to hear the appeal.

As to the facts, it is clear that the operations performed by us effect no change in the product. We are licensed only as a packer, for buying, grading and packing; none of these operations is that of a manufacturer. Tobacco leaves us in the same form as that in which it is received from the grower. [ROBERTSON C.J.O.: Can your operations not be considered as a stage in the manufacturing process? The business is somewhat similar to the woollen business, where the wool is treated in various stages.] The line must be drawn somewhere, and the proper place to draw it is in the various plants. The process in this plant does not change the character, form or content of the product. [ROBERTSON C.J.O.: It is made up into something that is marketable.] Wool is marketable when it is clipped from the sheep. If grading and buying are not manufacturing processes, then packing alone cannot be. The dividing line is between the raw



leaf and the dry tobacco. When the tobacco leaves our plant it is not ready for use. All that we do is to restore a uniform moisture content, and the mere fact that we use machinery, instead of leaving the tobacco in a room, which would eventually produce the same result, does not change the character of our operations. The word "manufacturer" must be interpreted according to common sense, and the question whether or not we are a manufacturer is a question of fact, not of law. [ROACH J.A.: If the owner of a gravel pit screens out the large stones, is he a manufacturer?] I am not prepared to say, but in any case that process goes further than ours, because he obtains a different product by it.

The Excise Act, 1934 (Dom.), c. 52, s. 7(p), as re-enacted by 1940-41, c. 16, s. 1, sets out all that we are permitted to do, and ss. 256 and 257 contain prohibitions against the holders of such a licence as we have. If we are a manufacturer, we are guilty of a crime under that Act. I refer to *Rex v. Pee-Kay Smallwares Limited*, [1947] O.R. 1019, [1948] 1 D.L.R. 235, 90 C.C.C. 129, 6 C.R. 28.

Our process is a mere step in storage, which is not for purposes of ageing the tobacco, but merely on a basis of supply and demand.

As to s. 405(1), that is a section passed for a special purpose, the establishment of fixed assessments in certain cases. A grain elevator is obviously not a manufacturing establishment, yet it is included in s. 405(1). The provision is one for the benefit both of the taxpayer and the municipality—the municipality is enabled thereby to attract new businesses, ensure additional employment, and to collect more taxes, and probably obtains the greater benefit.

*Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 4 D.L.R. 145, is not in point here, and in any case it cannot create either *res judicata* or estoppel because the parties here are not the same.

The relationship between the companies, even if it were established, cannot affect our legal position, because we are in fact a separate entity from Imperial Tobacco Company of Canada Limited, and the fact that that company is a manufacturer does not affect us: *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22 at 42.

If we were held to be a wholesale merchant, everyone in the packing business would be so equally.

*W. P. Mackay, K.C.*, in reply: If this plant makes no change in the product, then there is a million-dollar plant maintained for no purpose. The definitions in The Excise Act cannot govern a matter under The Assessment Act. It is a Dominion revenue Act, and has nothing to do with Provincial matters. It is obvious that no company would accept a fixed assessment unless it thought it beneficial to do so.

In *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326, the company was held to be a retail merchant as well as a manufacturer.

The mere fact that the tobacco has to be shredded after it leaves the respondent's plant does not indicate that the respondent does not manufacture. Something has been done which would not otherwise have been done. Storage is part of the processing of tobacco; one year of storage is essential for proper ageing.

*Cur. adv. vult.*

16th June 1949. ROBERTSON C.J.O.:—This is an appeal by the municipal corporation, by way of stated case, from the judgment of His Honour Judge Brickenden, of the County Court of the County of Norfolk, under s. 85 of The Assessment Act, R.S.O. 1937, c. 272. The respondent was assessed for business tax in respect of its business premises in the village of Delhi, as a manufacturer. As a manufacturer, the respondent would be liable, under clause (e) of s. 8(1) of The Assessment Act, to be assessed at 60 per centum of the assessed value of the land occupied or used by it. The respondent did not object to the value at which its land was assessed, but appealed to the court of revision against its business assessment, claiming that it was not a manufacturer, and that it was properly assessable under clause (k) of s. 8(1) at 25 per centum of the assessed value of its land.

The appeal was dismissed and the assessment was confirmed. Respondent appealed from the court of revision to the County Judge. This appeal was allowed, and the respondent's business assessment was reduced to 25 per centum of the assessed value of its land.

The municipality, desiring to appeal from the decision of the County Judge, procured him to state a special case to the Court of Appeal, pursuant to s. 85 of The Assessment Act, and upon that special case this appeal was heard.

The special case is made up of a statement of the facts in evidence, a statement of the County Judge's decision and his reasons therefor, which are attached and included as a schedule to the special case. Then the questions submitted are set forth, and they are the following:

"Upon the facts above stated and upon a true construction of the Assessment Act,

"1. Is Imperial Leaf Tobacco Company of Canada Limited liable to business assessment as a manufacturer under Section 8(1)(e) of the Assessment Act?

"2. Is the said Company liable to business assessment as a wholesale merchant under Section 8(1)(c) of the Assessment Act?

"3. Is the said Company liable to business assessment under Section 8(1)(k) of the Assessment Act?"

By subs. 1 of s. 85, such an appeal lies to the Court of Appeal "from the judgment of the judge on a question of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Ontario Municipal Board (except an order under section 84)". Any party so desiring to appeal to the Court of Appeal "shall on the hearing of the appeal by the judge, request the judge to make a note of any such question of law or construction, and to state the same in the form of a special case for the Court of Appeal". It is clear, therefore, that the only questions that the statute permits to be stated by the County Judge are questions within the description in s. 85(1) of the matters in respect of which such an appeal may be taken. The Court of Appeal is not to be asked questions of fact, and in this instance a copy of the evidence before the County Judge is not included. For the facts, it is necessary to refer to the statement of facts in the special case.

It is obvious that, in this case, nothing was to be gained by the appellant municipality by questioning our jurisdiction to hear the appeal. If no appeal lay, then the decision of the County Judge stood. Counsel for the respondent submitted, however,



that the appeal was upon a finding of fact — that the respondent was not a manufacturer, but came under s. 8(1), clause (*k*).

I am of opinion that the questions submitted by the County Judge are the questions to which we are to look to see what we are required to answer, and the question whether or not the appeal is within our jurisdiction to determine depends upon those questions, read in the light of what is contained in the special case. It is not, in my opinion, open to this Court to propound to itself some other question that the special case does not contain, and to determine the question of our jurisdiction to entertain the appeal by the character of such other question. We are confined to the special case, and if it does not contain what is essential, we should consider the propriety of sending it back for amendment, if so requested.

I am of opinion that this special case is sufficient as it is, and that the questions submitted are within our jurisdiction to answer, as coming within s. 85(1). Having regard to the arguments submitted to us, to determine whether the respondent is (1) a manufacturer under s. 8(1)(*e*), or (2) a wholesale merchant within s. 8(1)(*c*), or (3) falls within s. 8(1)(*k*), depends upon the proper construction of the statute.

Appellant argues, among other things, that the respondent is estopped from claiming that it is not a manufacturer, because for a time it had a fixed assessment under a by-law of the appellant passed pursuant to s. 405(1) of The Municipal Act, R.S.O. 1937, c. 266, as “any person carrying on or proposing to carry on within the municipality any manufacturing business”.

It was further submitted that respondent is a manufacturer, because it is a wholly-owned subsidiary and the agent of Imperial Tobacco Company of Canada Limited, to which it ships its product. Other arguments were adduced upon the particular shade of meaning that should be given the word “manufacturer”. Appellant alternatively argued that respondent is a wholesale merchant.

These are all matters involving the proper construction of the statute, if not other questions of law.

Agreeing as I do with the judgment of the County Judge, I think the first and second questions should be answered “No”, and the third question should be answered “Yes”.

The appeal should accordingly be dismissed with costs.

ROACH J.A.:—This is an appeal by the Corporation of the Village of Delhi on a case stated by His Honour Judge Bricken- den, of the County Court of the County of Norfolk, pursuant to s. 85 of The Assessment Act, R.S.O. 1937, c. 272. The case stated is as follows [see *supra*].

Section 85(1) of The Assessment Act provides that “An appeal shall lie to the Court of Appeal as hereinafter provided from the judgment of the judge on a question of law or the construction of a statute . . .”

At the threshold of this appeal the question arises: Are the questions contained in the case stated questions of law or are they questions of fact? If they are the latter, then, of course, no appeal lies to this Court.

Under s. 8(1) of the Act the quantum of business assessment varies according as the class of business varies. In classifying any business for business assessment the assessor, or on an appeal from him the court of revision, or on an appeal from it the County Judge, must first ascertain what have been called the primary facts, and from those primary facts must draw a conclusion as to the classification into which the particular business falls for business assessment. If any question of law is involved in this appeal it can relate only to the conclusion reached by the County Judge on those primary facts. His conclusion, in my opinion, is always a conclusion of fact, but that conclusion of fact may depend upon a question of law. If it does, then an appeal lies to this Court.

Then does the conclusion of the County Judge in the instant case depend upon any question of law? In my opinion it does, and why it does I hope to make clear in these reasons.

In *Re Hiram Walker & Sons Limited and Town of Walkerville* (1917), 40 O.L.R. 154, 38 D.L.R. 758, the appellant company contended that its business consisted not only of distilling but also of blending liquors and warehousing the product of distillation as well as the blended liquors and that only that part of the premises in which the process of distillation took place should be taken into account in ascertaining the amount at which the company should be assessed for business assessment as a distiller.

The appeal was from an order of the Ontario Railway and Municipal Board and the members of this Court which heard the

appeal were Meredith C.J.O. and Maclaren, Magee, Hodgins and Ferguson JJ.A. This Court dismissed the appeal on the ground that the issues were questions of fact and not of law. Meredith C.J.O., delivering the judgment of the Court, said in part:

"The Court cannot, I think, know judicially what such a business [that is, the business of a distiller] is, and the question of what it is must therefore be a question of fact." He then continued:

"I do not think that there can be any reasonable doubt that, where it is shewn that a distiller, in addition to distilling, warehouses the product of distillation and also blends liquors from the process of distillation and warehouses these liquors, the business of distiller as used in the clause may embrace all these branches of the business."

Then after a reference by way of analogy to the business of a chemist or druggist the Court continued: "Such considerations as these appear to me to shew that the question must be one of fact in each case; the question being what is generally understood to be comprehended in the particular business designated."

I shall have more to say about this case, but first I want to refer to two other cases which followed it.

The first is *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326. In that case the company had its factory in the town of Walkerville, where it manufactured automobiles. Sales of the products of its factory for shipment to or delivery at places other than in Windsor were made at the factory premises. The company was the tenant of other premises in the city of Windsor which it occupied as a show-room and sales-room for the sale of the products of its factory, and in which it also operated a garage.

The County Judge held, on an appeal to him from the court of revision, that the company should be assessed for business assessment in the city of Windsor as a manufacturer. An appeal to this Court (composed of Meredith C.J.O. and Maclaren, Magee and Hodgins JJ.A.) on a case stated by the County Judge was dismissed. Meredith C.J.O., with whom Maclaren and Hodgins JJ.A. agreed, said in part:

"The appellant is undoubtedly carrying on the business of a manufacturer; and, in my opinion, the business carried on in Windsor is a part of that business. The appellant's business



has two branches, one its manufactory proper and the other its show-room and sales-room, and both are an integral part of the business of a manufacturer carried on by the appellant."

Mr. Justice Magee wrote separate reasons in which, while refraining from dissenting from the opinion of the other members of the Court, he expressed some doubts as to the proper classification of the appellant for business assessment in Windsor.

No reference is made in either judge's reasons to the questions considered by these same judges in the *Hiram Walker* case, namely, whether any question of law was involved in the appeal.

Admittedly the appellant was carrying on the business of a manufacturer in Walkerville and the case in this Court turned on whether the appellant's business in Windsor was part of its manufacturing business. Clearly the Court found that fact. To compare the operations of one business with those of another for the purpose of determining whether they are one and the same business, or two businesses of the same class, or businesses of a different class, involves an inquiry in the field of facts only and not of law. Nevertheless, as I hope to show later, there was a question of law involved even in this case.

The second case is *Re The City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73. There the facts were as follows: The company was a manufacturer, with a plant in the Province of Quebec where it manufactured its products. It also occupied premises in the city of Toronto where it had an office and warehoused goods shipped from the factory in Quebec. Orders for its goods were taken by the company in its Toronto premises and those orders were filled either from the goods on hand in Toronto or from the factory in Quebec.

The County Judge, on appeal to him, held that the company was liable to business assessment in the city of Toronto as carry-on the business of a manufacturer in the Toronto premises. He stated a case to this Court in substance as follows: Was he right in holding that the company should be assessed for business tax as a manufacturer? If he was wrong, then was the company liable to business assessment as a wholesale merchant?

On the appeal to this Court on the case stated Gillanders J.A., delivering the judgment of the Court said at p. 411:

"The vital question to consider is whether the respondent company is 'occupying or using' the premises in respect of which

it is assessed for the purpose of 'carrying on the business of a wholesale merchant', or for the purpose of 'carrying on the business of a manufacturer'."

Then he sets out the opposing contentions of the parties and refers to, *inter alia*, the *Studebaker* case and the *Hiram Walker* case. In referring to the *Studebaker* case he says: "I think the principle of the decision in the *Studebaker* case is in point here." He concludes the judgment of this Court as follows:

"In the case at bar, the County Court Judge having found that the respondent is a manufacturer, that the premises in question are used for the purposes stated, and that the goods there stored and sold are goods of their own manufacture, I think it must be held that the business being conducted in the premises in question is part of the business of a manufacturer."

There is no specific reference in terms to the question there before the Court being either a question of fact or a question of law. However, in the reference to the *Hiram Walker* case that part of the judgment delivered by Meredith C.J.O. which I have quoted is also quoted with apparent approval.

As I read that case the Court did not consider or lay down as a question of law what constituted the business of a manufacturer any more than did the Court in the *Studebaker* case. In each of those cases the company was admittedly a manufacturer and the question was whether the business of the company conducted from the premises in the city of Toronto was part of its business of a manufacturer or not.

In other words, in neither of those cases did the Court, in the process of reaching its conclusions, first determine what is meant by the business of a manufacturer when considered in the abstract and then decide whether the business in question fitted into that definition.

To return now to the *Hiram Walker* case; I think that case was rightly decided but I think it was error to say that "the Court cannot judicially know what the business of a distiller is". Unless I know what constitutes the business of a manufacturer or the business of a wholesale merchant, I cannot decide the instant case. I must know it, not for the purpose of deciding a question of fact, but for the purpose of deciding the question of law which, in my opinion, must always arise in such cases as the present namely, do the evidentiary facts in the case stated

reasonably justify the business of the person taxed being classified as the County Judge classified it? It is a question of evidence or no evidence and that, of course, is a matter of law.

In the *Hiram Walker* case the company admittedly was carrying on the business of a distiller, and in the *Studebaker* case and the *Corticelli* case the company in each instance was carrying on the business of a manufacturer. Hence the classification of the business in question did not depend upon what was meant by the business of a distiller in the one case and the business of a manufacturer in the others when considered in the abstract.

Notwithstanding the absence of that problem, I suggest that in each of those cases a question of law existed and it was this, namely, was there evidence upon which the particular business, as carried on in the premises in question, could have been reasonably classified as the County Judge had classified it?

In *Rogers-Majestic Corporation Limited v. The City of Toronto*, [1943] S.C.R. 440, [1943] 3 D.L.R. 609. Kerwin J., in delivering the judgment of the Court, discusses, at pp. 447-8, this particular question of law and refers to the judgments of the House of Lords in *Farmer v. Cotton's Trustees*, [1915] A.C. 922 and *Girls' Public Day School Trust, Limited v. Ereaut*, [1931] A.C. 12. To those cases can be added the case of *Commissioners of Inland Revenue v. Lysaght*, [1928] A.C. 234.

As Mr. Justice Kerwin points out, the two cases referred to by him were appeals under the Income Tax Acts; so was the *Lysaght* case. An appeal to the Courts from the commissioners appointed under the Acts was permitted by the Acts if the assessment made by the general commissioners was claimed to be "erroneous in point of law". The commissioners had held that under the Act Mr. Lysaght should be held to be "resident" in England. From that finding he appealed. He succeeded in the Court of Appeal but the House of Lords reversed the Court of Appeal and sustained the commissioners. Viscount Sumner in his speech, at p. 243, said this:

"It is well settled that, when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (a) that they had before them evidence, from which such a conclusion could properly be drawn, and (b) that they did not misdirect themselves in law in any of the forms of



legal error, which amount to misdirection.” He said this further at p. 246:

“It is attractive to say, as in substance was the opinion of the Court of Appeal, that ‘resident’ in this case is a matter of law, as being a matter of interpretation, but that does not cover the ground. Interpretation only says what the Act itself refrains from telling us—namely, the meaning of the word ‘resident’—but, as that meaning is its meaning in the speech of plain men, the question still remains, whether plain men would find that the result of the facts found was ‘residence’ in its plain sense, and I do not doubt that the Commissioners understood the word not otherwise than in its correct legal signification and so applied it.”

From what was said in the Supreme Court of Canada in the *Rogers-Majestic* case and in the House of Lords in the cases there cited and in the *Lysaght* case, it is manifest that in all cases similar to the one at bar two questions of law arise. The first involves the construction of the statute, and the second is the question of evidence or no evidence. I now deal with those questions of law as they here arise.

Neither “manufacturer” nor “wholesale merchant” is defined in the Act, but I have no doubt that the County Judge understood the legal signification of the words “the business of a manufacturer” and “the business of a wholesale merchant”. If one turns to dictionaries for a definition of “manufacture” one finds it defined in Webster’s 20th Century Dictionary as “the operation of making goods or wares as cloth, utensils, paper, books and whatever is used by man; the operation of reducing raw materials of any kind into a form suitable for use by the hands or by machinery”. The word carries with it the concept of making something.

If we turn to reported decisions in the Courts we find this said as to its meaning, in *In re H. Robinson Corporation Limited; The King v. Martin* (1937), 19 C.B.R. 22 at 30, affirmed [1938] O.W.N. 243, 19 C.B.R. 246: “. . . to manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.”

In *McNicol et al. v. Pinch*, [1906] 2 K.B. 352 at 361 Darling J. says: "I think the essence of making or manufacturing is that what is made shall be a different thing from that out of which it is made."

In Murray's New English Dictionary a merchant is defined as "one whose occupation is the purchase and sale of marketable commodities for profit", and a wholesale merchant, of course, is one who carries on that occupation in a wholesale way as distinguished from retail.

The complaint of counsel for the appellant was not that the County Judge misinterpreted the vital words. Actually counsel adopted the County Judge's definition of "manufacture". His argument was that the facts brought the respondent within that definition, or, in the alternative, within the meaning of wholesale merchant. Therefore, the only question of law that arises here is whether or not there was evidence from which the County Judge could reasonably decide, that is make his conclusion of fact, that the business carried on by the company came within one of the businesses assessable under s. 8(1)(k) and not in s. 8(1) specifically mentioned by name. Since clause (k) is an omnibus one embracing all businesses not in that clause or elsewhere in the subsection specifically mentioned, it became necessary for the County Judge to determine whether on the facts the business of the company fitted into any of the other classifications named in the section. If it did not, then it came within the classification in which he placed it. In my opinion there was no evidence on which he could reasonably have placed it in any of the classifications specifically named in the section.

The questions stated should therefore be answered as follows:

Question no. 1—No

Question no. 2—No

Question no. 3—Yes

The respondent is entitled to the costs of this appeal.

AYLESWORTH J.A.:—In this appeal I have had the privilege of reading the judgments of my Lord the Chief Justice and of my brother Roach, and I agree in the result reached by them, but desire to add a word or two upon one aspect of the case.

At the hearing of the appeal respondent argued that the questions addressed to this Court in the special case were ques-

tions of fact and not of law, and that the appeal, therefore, was not properly before us. The specific questions in the special case are therein addressed to us "upon the true construction of the Assessment Act". I think this accurately describes the situation, as, in my view, these specific questions actually and necessarily involve a construction of the statute, and it therefore follows that the questions are proper questions for submission to this Court under s. 85 thereof. In an appeal under s. 85 we are confined to the special case itself and are not, I think, permitted to do other than answer the specific questions thus addressed to us, always provided, of course, that the special case is complete, and that the Court is not called upon to remit the case as being incomplete.

But, in any event, is it open in this appeal for the respondent to argue against the propriety of the case stated?

Section 85(2) of The Assessment Act provides: "Any party desiring so to appeal to the Court of Appeal shall on the hearing of the appeal by the judge request the judge to make a note of any such question of law or construction, and to state the same in the form of a special case for the Court of Appeal".

Section 85(7) provides: "Where an appeal lies from the decision of the judge to the Ontario Municipal Board under section 84 the judge shall not state a case under this section, unless all the parties consent and request him to do so and if a case is so stated an appeal shall not lie to the Ontario Municipal Board under section 84."

Obviously this is a case where a right of appeal to the Ontario Municipal Board was conferred under s. 84 of the statute. It was not suggested that the questions submitted were other than precisely those noted by the County Judge under s. 85(2), and with respect to which the parties requested, under s. 85(7), that a case be stated. In these circumstances it may be that a party consenting to and requesting the statement of a special case is precluded from taking the position in this Court that the questions submitted are not proper questions for submission under the section. The point may become of importance in some appeal to be heard in the future, but as it was not argued before us, and



as it is unnecessary to decide the point in this appeal, I express no opinion upon it.

*Appeal dismissed with costs.*

*Solicitor for the appellant: W. P. Mackay, Simcoe.*

*Solicitors for the respondent: Smith, Rae, Greer & Cartwright, Toronto.*

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[COURT OF APPEAL.]

**Broderick et al. v. Toronto Transportation Commission et al.**

*Negligence—Contributory and Ultimate Negligence—Inapplicability of Test of “last chance” or “last opportunity”—Determining whose Negligence effectively Caused Loss or Damage—Effect of Statutory Onus.*

It has been repeatedly pointed out that there is no doctrine of “last chance” or “last opportunity” in the Ontario law of negligence. The real question to be decided is: What was the cause, or what were the causes, of the loss or damage? In answering that question the facts of the particular case, and the findings made on the evidence, must be considered, and if those findings are good and sufficient it serves no purpose to consider what other findings might have been made in the court below. The findings must be read as a whole, and it is not proper to examine one finding apart from the others.

R, driving south along a “divided” highway, desired to turn to the east, but was compelled to wait in the centre strip, with the rear of his vehicle foul of street-car tracks, for northbound traffic to pass on the east side of the highway. While he was standing in this position, he was struck by a street-car operated by T, and the infant plaintiff, riding in the street-car, was injured. The jury found that R had not satisfied them that he had not been negligent, and that T had also been negligent, in that (a) he did not apply his brakes when he blew his whistle, and (b) he had sufficient time to stop the street-car before the impact. They apportioned the degrees of negligence, and judgment was entered according to the findings.

Held, the judgment could not stand as against R. Assuming, for the purposes of the appeal, that R had been negligent prior to the time when he was compelled to stop, there was no evidence of any subsequent act of negligence on his part. The jury’s findings, read as a whole, plainly meant that T saw the dangerous state of affairs created by the truck standing on the crossing, and negligently failed to avoid the collision when with reasonable care on his part it could have been avoided. In these circumstances the principle of *Davies v. Mann* (1842), 10 M. & W. 546, was applicable, and T should be held solely responsible for the plaintiff’s damage. *Anglo-Newfoundland Development Company, Limited v. Pacific Steam Navigation Company*, [1924] A.C. 406 at 420; *Admiralty Commissioners v. Owners of SS. Volute*, [1922] 1 A.C. 129 at 136; *Davies v. Swan Motor Co. (Swansea) Ltd.*, [1949] 1 All E.R. 620 at 630, applied.

AN APPEAL and cross-appeal from the judgment of Barlow J., entered on the findings of a jury.

9th June 1949. The appeal and cross-appeal were heard by LAIDLAW, HOPE and BOWLBY JJ.A.

G. A. McGillivray, K.C., for the defendants Toronto Transportation Commission and Taylor, appellants: The finding of negligence against us was perverse inasmuch as the evidence does not establish any negligence on our part. Alternatively, the particulars found against us do not constitute negligence in law: *Smith Transport Limited v. Shurtleff*, [1948] O.W.N. 412; *Hendrie v. Grand Trunk Railway Co.* (1921), 51 O.L.R. 191, 67 D.L.R. 165, 29 C.R.C. 72; *Taylor v. Ainslie*, [1931] O.R. 188, [1931] 3 D.L.R. 26; *Toronto Railway Company v. King et al.*, [1908] A.C. 260, 77 L.J.P.C. 77, C.R. [1908] A.C. 326, 12 O.W.R. 40, 7 C.R.C. 408.

The answers of the jury are inconsistent, as this is clearly a case where one or other of the defendants must be wholly liable. The jury have found both drivers negligent, but on different grounds. If they accepted Rosenberg's evidence, then our negligence must have been the sole cause of the accident. Since they apparently disbelieved him, there is no credible evidence of negligence on our part. In any case, one finding or the other is obviously bad, and there must be a new trial: *Gray Coach Lines Limited et al. v. Payne*, [1945] S.C.R. 614, [1945] 4 D.L.R. 145; *Cossitt v. Canadian Pacific Railway Company*, [1949] O.W.N. 141, [1949] 2 D.L.R. 201.

G. T. Walsh, K.C., for the defendant Rosenberg, respondent and cross-appellant: The judgment should have been against the appellants only, and the jury should have found that the negligence of the street-car operator was the sole cause of the accident. They found by implication that he could have stopped, and thus avoided the accident, after we had stopped on the tracks: *Holgate v. Canadian Tumbler Co.* (1931), 40 O.W.N. 565; *Rogers et al. v. Lewis et al.*, [1934] O.W.N. 441; *Storry v. Canadian National Railway Company*, [1940] S.C.R. 491, [1940] 3 D.L.R. 554, 51 C.R.T.C. 161; *Long v. Toronto Railway Company* (1914), 50 S.C.R. 224, 20 D.L.R. 369, 18 C.R.C. 92.

D. J. Walker, K.C., for the plaintiffs, respondents: The judgment should stand against both sets of defendants. There was no reason for the street-car motorman to anticipate that Rosenberg would stop on the tracks and not proceed across the street. Rosenberg made a negligent turn without looking, and this negligence continued up to the time of the collision.

*G. A. McGillivray, K.C.*, in reply: The doctrine of ultimate negligence is inapplicable in such circumstances as these: *British Columbia Electric Railway Company, Limited v. Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4, 8 W.W.R. 1263, 20 C.R.C. 309, 32 W.L.R. 169; *Davies v. Swan Motor Co. (Swansea) Ltd.*, [1949] 1 All E.R. 620.

*Cur adv. vult.*

21st June 1949. The judgment of the Court was delivered by

LIDLAW J.A.:—This is an appeal by the defendants Toronto Transportation Commission and James Taylor from a judgment of Barlow J., dated the 21st January 1949, after trial with a jury and answers made by them to certain questions. The defendant Max Rosenberg served and filed a notice of motion for an order to vary the judgment of the Court below and asks that the action be dismissed as against him with costs.

The action was brought to recover damages for personal injuries suffered by the infant plaintiff, aged 13 years, when he was travelling as a passenger on a street-car of the appellant Toronto Transportation Commission, operated by the appellant James Taylor. The father of the infant claims loss sustained by him by reason of the injuries to his son.

The street-car collided with a motor truck owned and driven by the defendant Rosenberg, which was standing on a crossing of the railway from one side of the highway to the other. At the place of the accident, on Yonge Street north of the city limits of Toronto, there is a single line of electric railway tracks located at or near the centre of the street. The street runs northerly and southerly. On the west side of the street and line of tracks there is a double-lane roadway for southbound vehicular traffic, and on the east side there is a like roadway for northbound vehicular traffic. Madawaska Avenue runs easterly from the east limit of Yonge Street, and immediately opposite the entrance to Madawaska Avenue from Yonge Street there is a level crossing over the tracks of the Toronto Transportation Commission for vehicular traffic from the westerly part of the highway to the easterly part and thence into Madawaska Avenue.

A street-car was southbound at or about midday on the 12th August 1948. The defendant Rosenberg was also southbound, driving a motor truck, and he was travelling on the westerly part



of the highway. He intended to proceed into Madawaska Avenue. He turned easterly, to his left, and, when his truck was on the crossing, he was forced to stop the vehicle with the rear end foul of the tracks because of northbound vehicular traffic. While his truck was standing in that position to allow the northbound vehicular traffic to pass, the street-car collided with it. The infant plaintiff was standing a short distance behind the operator of the street-car, and suffered severe personal injuries as a result of the collision.

I now quote the questions submitted to the jury and their answers thereto, as follows:

"1. Has the defendant Rosenberg satisfied you that the injuries suffered by the infant plaintiff were not caused by any negligence or improper conduct on the part of the said defendant? Answer 'yes' or 'no'. A. No.

"2. Was the defendant James Taylor the operator of the street car guilty of any negligence causing or contributing to the infant plaintiff's injuries? Answer 'yes' or 'no'. A. Yes.

"3. If your answer to question 2 is 'yes' then state fully of what such negligence consisted. A. (A) Did not apply brakes at time of first sounding warning whistle. (B) In our opinion he had sufficient time to stop street-car before impact.

"4. If you find both the defendant Rosenberg and the defendant Taylor were negligent give the degrees of such negligence in percentages if possible. A. Defendant Rosenberg 30%; defendant Taylor 70%.

"5. Regardless of whom you may think is responsible for the infant plaintiff's injuries or in what percentage at what amount do you assess the total damages of the infant plaintiff? A. (a) of the infant plaintiff \$8,000.00; (b) of the adult plaintiff Leicester Charles Broderick \$314.90."

At the trial, and in this Court, counsel on behalf of the Toronto Transportation Commission and Taylor endeavoured to show that the whole responsibility for the accident rests upon the appellant Rosenberg, and he in turn sought to show that the sole cause of the accident was the negligence of the operator of the street-car. In their notice of appeal to this Court, the Toronto Transportation Commission and Taylor set forth expressly that: "This was a case where the liability should have been 100 per cent. as against the defendant Rosenberg or the defendants Toronto Transportation Commission and James

Taylor, and a finding of split liability is inconsistent with the evidence." In the memorandum of facts and law filed by counsel on behalf of the appellants, it is also set forth that: "In finding both parties guilty of negligence the jury makes wholly inconsistent findings. On the evidence a finding of contributory negligence should not have been made as one party or the other is 100 per cent. responsible."

Counsel for the appellants contends that the evidence shows plainly that there was negligence on the part of the respondent Rosenberg in turning on to the railway tracks and stopping his truck there when the street-car was approaching so close to the crossing that he ought to have realized the danger of a collision. He proceeded then with the argument that when the jury answered question 1 in the negative, showing that they were not satisfied by Rosenberg that the injuries suffered by the infant plaintiff were not caused by any negligence or improper conduct on his part, it must be concluded that they refused to accept the evidence of Rosenberg and witnesses in support of his allegation that there was negligence on the part of the operator of the street-car.

I am not at all prepared to agree with the contention that there was negligence on the part of Rosenberg. I can find nothing in the evidence from which a jury could reasonably find that he was negligent in turning on to the crossing or stopping there under the existing circumstances. According to evidence which was undoubtedly trustworthy and accepted by the jury, the street-car was far enough away from the crossing when Rosenberg turned on to it to make it a reasonably safe act of driving on his part.

But I need not discuss at length that view of the evidence because, for the purposes of this appeal, I am willing to assume that there was in fact negligence of Rosenberg prior to the moment when he was compelled to stop his vehicle to give north-bound vehicular traffic the right of way and permit it to pass in safety, but, having stopped for that purpose, there was no subsequent negligent act on his part, and there was no evidence from which a jury could make any such finding. The answer of the jury to question 1 must be based upon the conduct of Rosenberg up to the time he stopped his vehicle and not afterwards. Therefore, one must consider whether that conduct

was the cause or one of the causes of the damage resulting from the accident.

It has been repeatedly pointed out that there is no doctrine of "last chance" or "last opportunity" in the law of negligence of this Province. The real question to be decided is: What was the cause or what were the causes of the damage? In answering that question, it is essential to consider the facts of each particular case and the findings as made on the evidence. When those findings are good and sufficient in law, it serves no purpose to consider what other findings might have been made in the court below. I observe, too, that it is not proper to approach the consideration of the case by examination of each finding apart from other findings of the jury. The findings ought to be read as a whole. In this particular case, the jury made a finding of negligence on the part of the operator of the street-car as follows:

"(A). Did not apply brakes at time of first sounding warning whistle. (B) In our opinion he had sufficient time to stop street-car before impact."

It is abundantly plain from that finding, read as a whole, as it should be, that the jury reached the conclusion that the operator of the street-car saw the dangerous state of affairs created by the truck standing on the crossing, and negligently failed to avoid the collision when with reasonable conduct on his part it could have been avoided. The principle in *Davies v. Mann* (1842), 10 M. & W. 546, 152 E.R. 588, is plainly applicable to the situation. It is expressed by Lord Shaw of Dunfermline in *Anglo-Newfoundland Development Company, Limited v. Pacific Steam Navigation Company*, [1924] A.C. 406 at 420, as follows:

" . . . although there might be—which for the purpose of this point I am reckoning that there was—fault in being in a position which makes an accident possible yet, if the position is recognized by the other prior to operations which result in an accident occurring, then the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the



fact that there was a danger to be encountered. There is a period of time during which the causal function of the act or approach operates and it is not legitimate to extend that cause backwards to an anterior situation. The anterior situation may be brought about either innocently or by some mistake; but if it has nothing to do with the subsequent operations which contributed to produce an accident or collision, it is not legitimate to treat it as a contributory in liability for the result thus produced."

Lord Shaw proceeds to refer to *Admiralty Commissioners v. Owners of S.S. Volute*, [1922] 1 A.C. 129 at 136, where Viscount Birkenhead L.C. stated: "In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full."

In the present case the whole cause of the collision arose from the subsequent and severable negligence on the part of the operator of the street-car; that is to say, negligence arising subsequent to the known existence of the obstruction on the railway tracks and severably caused by the approach of the street-car to and its collision with that obstruction. In *Davies v. Swan Motor Co. (Swansea) Ltd.*, [1949] 1 All E.R. 620 at 630, Denning L.J. refers to *Anglo-Newfoundland Development Company, Limited v. Pacific Steam Navigation Company*, *supra*. He says: ". . . I will take the case of a man who negligently leaves his car parked on a dangerous bend in the road or across a railway line in the docks and it is negligently run into by an oncoming vehicle. That is a case to which the observations in *Davies v. Mann* would appear to apply." He continues: "If the defendant actually saw that a dangerous state of affairs had been created by the negligence of the plaintiff, and the defendant thereafter, by the exercise of reasonable care, could have avoided doing any damage. then he was solely liable if he failed to exercise that care."

He points out that that statement is not a proposition of law but only a test of causation.

My opinion is that upon the findings of the jury it must be held that the liability for the loss or damage suffered by the plaintiffs in this case rests wholly upon the appellants Toronto Transportation Commission and Taylor and the action ought to have been dismissed as against the respondent Rosenberg.

I would dismiss this appeal and allow the motion of the respondent Rosenberg for an order to vary the judgment of the Court below. The judgment of that Court as varied should provide that the plaintiffs recover from the defendants Toronto Transportation Commission and James Taylor the respective amounts assessed by the jury together with costs, and the action should be dismissed as against the defendant Rosenberg with costs. The plaintiffs ought to be allowed to add to the amount of the costs awarded to them against the defendants Toronto Transportation Commission and Taylor the amount they may pay to the defendant Rosenberg. The costs of this appeal should be paid by the appellants to the plaintiffs respondents and the respondent Rosenberg. The respondent Rosenberg ought to be allowed the costs of a motion to this Court to vary the judgment of the Court below, the amount of such costs to be paid by the appellants.

*Judgment varied.*

*Solicitor for the plaintiffs, respondents: David J. Walker, Toronto.*

*Solicitor for the defendant Rosenberg: A. J. Sneath, Toronto.*

*Solicitor for the other defendants, appellants: Irving S. Fairty, Toronto.*

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[COURT OF APPEAL.]

**Re Imperial Leaf Tobacco Company of Canada and the Township of Mersea.**

*Taxation—Municipal Business Assessment—Questions of Law and Fact—Appeals to Court of Appeal—Whether Taxpayer a Manufacturer—The Assessment Act, R.S.O. 1937, c. 272, ss. 8(1), 84, 87.*

Where the Ontario Municipal Board, on appeal from a County Court Judge in a matter of assessment, wrongly relies upon a decision of the Court as authority for a proposition of law not laid down in that case, this constitutes error in law sufficient to give a right of appeal to the Court of Appeal under s. 84(6) of The Assessment Act.

On the facts herein, *held*, the Board was wrong in holding that the appellant company was liable for business assessment as a manu-

facturer under s. 8(1)(e) of the Act, and in relying upon *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, as authority for that decision. The company, which was admittedly liable for business tax, should rather have been assessed under s. 8(1)(k).

*Taxation — Appeals — Jurisdiction of Tribunals — Validity of Sections Giving Right of Appeal to Ontario Municipal Board — Further Appeal — Question of Law — The Assessment Act R.S.O. 1937, c. 272, ss. 84, 87 — The Ontario Municipal Board Act, R.S.O. 1937, c. 60.*

Per ROACH J.A.: Where it is admitted that a particular company is liable to assessment for business tax under one or other of the categories set out in s. 8(1) of The Assessment Act, the determination of the proper category is an administrative rather than a judicial matter, and it is therefore competent for the Provincial Legislature to permit an appeal to a County Judge on this question, and to set up the Ontario Municipal Board, a body with administrative functions, and provide that in the exercise of those functions the Board may review, amend or even annul the administrative acts of the County Judge. *Re the Jurisdiction of the Tariff Board of Canada*, [1934] S.C.R. 538 at 548, applied.

AN APPEAL from a decision of the Ontario Municipal Board.

8th and 9th December 1949. The appeal was heard by ROBERTSON C.J.O. and ROACH and AYLESWORTH JJ.A.

G. W. Mason, K.C., for the respondent: We have a preliminary objection to the hearing of this appeal. The appeal has two branches, one constitutional and the other an ordinary appeal from the findings of the Board. The right of appeal is limited by s. 84(6) of The Assessment Act, R.S.O. 1937, c. 272, and there is no right of appeal on questions of fact: *Re The City of Toronto v. The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314 at 324, [1935] 3 D.L.R. 327, affirmed [1936] S.C.R. 141, [1936] 2 D.L.R. 129. The County Judge, citing Webster's 20th Century Dictionary, found that "manufacture" was "the operation of reducing raw materials of any kind into a form suitable for use, by the hands or machinery", and that the appellant did not come within that definition. The Board accepted the correctness of the definition, but held that the company was not within it. This is a question solely of fact, and there can be no appeal upon it.

G. D. Watson, K.C., for the appellant (as to the preliminary objection): We are before the Court, and therefore have the right to speak: *Windsor Education Board v. Ford Motor Company of Canada, Limited et al.*, [1941] A.C. 453, [1941] 3 All E.R. 241, [1941] 3 D.L.R. 721. There is always a right of appeal as to the construction or interpretation of The Assessment Act, which is involved in this appeal, and the Municipal Board can-



not stop us from coming to the Court. [Counsel was directed to proceed with argument on the merits of the appeal.]

The Municipal Board has no jurisdiction to hear appeals from County Court Judges, and in so far as the relevant statutes purport to give it that jurisdiction they are *ultra vires*, as making it a superior Court, the members being appointed by the Province. The Board is set up under The Ontario Municipal Board Act, R.S.O. 1937, c. 60, and the important sections in this connection are ss. 5, 10, 40, 41, 42, 45, 53 and 59(j), the combined effect of which is to give to the Board a jurisdiction which might exclude the jurisdiction of the Supreme Court of Ontario. Another important provision is in s. 84(2) of The Assessment Act, R.S.O. 1937, c. 272, as re-enacted by 1948, c. 5, s. 12(2). [*G. W. Mason, K.C.*: The amendment is subsequent to the matters in issue here.] There was a right of appeal from a judge to the Board before the amendment, under subss. 1 and 2 of s. 84, and the jurisdiction of the Board is defined by subs. 5. Subs. 6 provides for an appeal to this Court, and subs. 7 is procedural. Section 87 is also of importance. Taking these sections at their face value, they give the Board a jurisdiction excluding that of this Court.

Sections 92(4) and (14), 96, 99 and 100 of The British North America Act, 1867, are clear in their effect. There are three basic principles to ensure the independence of the Courts, and their position should not be usurped by such legislation. The ambit of administrative power should not be enlarged to include the question of liability to taxation under a statute: *Re Alberta Railway Act* (1913), 48 S.C.R. 9, 4 W.W.R. 608, affirmed *sub nom. Attorney-General for Alberta v. Attorney-General for Canada*, [1915] A.C. 363, 22 D.L.R. 501, 7 W.W.R. 634, 19 C.R.C. 153.

Courts of revision existed before Confederation, but they were mere administrative bodies, and had no jurisdiction to determine questions of law, *e.g.*, whether or not a particular person is taxable: *Crown Grain Company, Limited v. Day*, [1908] A.C. 504, C.R. [1908] A.C. 150. [ROBERTSON C.J.O.: Apart from provisions corresponding to the present s. 87, the existence of courts of revision never excluded the jurisdiction of the ordinary Courts. A right of appeal to the Board existed before the enactment of s. 87, and there have always been doubts as to the constitutionality of that section.] It is intolerable that a provincially-appointed Board should sit in

review of the judgment of a Dominion-appointed judge. [ROBERTSON C.J.O.: There is a distinction between the judicial and administrative functions of a County Judge; when he sits on appeal from a court of revision, is he not acting administratively?] Whatever his decision, it may be reviewed by the Court of Appeal on a stated case, and the reviewing of a decision is a judicial function. The fact that the County Judge's duties may be administrative at the outset does not prevent the review of his decision from being a judicial inquiry. [ROBERTSON C.J.O.: The County Judge in such matters is not acting as a judge of the Court, and apart from The Assessment Act there could be no appeal from his decision unless you could bring it within The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123.] It is to him as a judge that jurisdiction is given. [ROBERTSON C.J.O.: But he exercises none of the powers of the Court.]

It is true that it was decided, in *Re The City of Toronto and The Township of York*, [1937] O.R. 177 at 191, [1937] 1 D.L.R. 175, 46 C.R.C. 55, affirmed *sub nom. Toronto Corporation v. York Corporation and Attorney-General for Ontario et al.*, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452, that the Municipal Board was an administrative body, but the Courts expressly reserved the question as to what would happen if the Board sought to exercise wider powers, and that question arises directly in this case. Nothing said in that case applies directly here, since the Board in this case derives its powers from The Assessment Act, and not from The Ontario Municipal Board Act. But the two Acts must be read together: *Re McLean Gold Mines Limited and The Attorney-General for Ontario*, 54 O.L.R. 573, [1924] 1 D.L.R. 10; *Shell Company of Australia, Limited v. Federal Commissioner of Taxation*, [1931] A.C. 275 at 295-7, [1931] 2 W.W.R. 231. I refer also to *Attorney-General for Ontario v. Attorney-General for Canada*, [1925] A.C. 750, [1925] 2 D.L.R. 753, [1925] 1 W.W.R. 1131; *Re The Adoption Act and Other Statutes*, [1938] S.C.R. 398 at 414, [1938] 3 D.L.R. 497, 71 C.C.C. 110, overruling *Clubine v. Clubine*, [1937] O.R. 636, [1937] 3 D.L.R. 754, 68 C.C.C. 327.

The Province cannot do indirectly what it is prohibited from doing directly: *Great West Saddlery Company, Limited v. The King*, [1921] 2 A.C. 91, 58 D.L.R. 1, [1921] 1 W.W.R. 1034; Lefroy, *Legislative Power in Canada*, 1897, pp. 386-7, citing *Tarte v. Beique* (1890), M.L.R. 6 S.C. 289, reversed M.L.R. 7

Q.B. 263 (*sub nom. Turcotte v. Béique and Whelan*), and *Burk v. Tunstall* (1890), 2 B.C.R. 12, 1 M.M.C. 61.

A few days ago this Court was asked to hear a stated case (*Re The Village of Delhi and Imperial Leaf Tobacco Company of Canada Limited*, ante, p. 636), involving the question whether this same company, in respect of precisely the same operations, should be assessed by another municipality as a manufacturer. If the Court found that the company was not a manufacturer, it would affirm the decision of the County Judge. But there would be nothing to prevent an appeal by the municipality next year to the Municipal Board, which, if there is no right of appeal in the present case, might adhere to its decision in this case. If the question is wholly one of fact, there would then be no right of appeal to this Court from the decision of the Board: *Re Toronto R.W. Co. and City of Toronto* (1918), 44 O.L.R. 381 at 398, 46 D.L.R. 547, 24 C.R.C. 278; *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited*, [1948] W.N. 386 at 387, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055. Each case must be tested by the powers of the tribunal in question.

On the evidence here it is untenable to say that we are a manufacturer. The operations are precisely the same as those described in the *Delhi* case, *supra*. We are engaged in buying, grading and packing, and operations incidental thereto, and none of these is properly classed as manufacturing. As to the drying and remoistening, the real test is what is the predominant nature of the business of the taxpayer; what the Court looks at is the main business of the company: *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326; *Re The City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73; *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 4 D.L.R. 145; *Hiram Walker & Sons Limited v. The Town of Walkerville*, [1933] S.C.R. 247, [1933] 3 D.L.R. 433. [ROBERTSON C.J.O.: There is a slightly different contention here. The parent company manufactures cigarettes. Not all of its processes are carried on in the same premises, or under the same name, but the contention is that your operations are an essential part of a manufacturing process. Do you escape taxation as a manufacturer by forming another company to do part of the processing?] We must look at the business of each individual taxpayer. A corporation has a right to build a fence, and there



is nothing concealed here. When this product ceases to be raw leaf tobacco, and not until then, the manufacturing process begins, and it is still raw leaf when it leaves us.

The express mention of tobacco driers in s. 405(1) of The Municipal Act, R.S.O. 1937, c. 266, providing for fixed assessments for manufacturing businesses, indicates that without express legislation they would not be considered manufacturing.

G. W. Mason, K.C., for the respondent: What is done in the appellant's plant is in fact manufacturing, and even if it were not, this company, because of its close association with Imperial Tobacco Company of Canada Limited [hereafter referred to as "Imperial Tobacco"], should be classed as a manufacturer because it does something which produces an article which is eventually to become a manufactured product. There is evidence here which was not before the Court in the *Delhi* case, *supra*. The tobacco must be aged, and its greenness must be removed; there is a chemical change, and it is all a part of the process of changing the raw leaf into something which is no longer raw leaf tobacco; it is more than mere storing and packing. The two companies have identical powers in their charters, and all the directors are the same. If this company sent the product to its own establishment in another part of the Province, and the cutting were done there (it is in fact done in the Montreal plant of Imperial Tobacco), there would be no doubt that it was performing part of the business of manufacturing, and it would be so assessed: *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 4 D.L.R. 145; *Kelvinator of Canada Limited v. City of London*; *Scmerville Limited v. City of London*, [1942] O.W.N. 485; *City of Toronto v. Lever Brothers Limited*, [1942] O.R. 421, [1942] 3 D.L.R. 468; *Re The City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73. The mere fact that there is a separate company in form should not affect the position. There is a single chain of production, under the control of the same persons throughout. Imperial Tobacco is the parent company; it advances funds for the payroll of the appellant; there are interlocking directorates; and the employees are all trained by Imperial Tobacco; this is a huge plant, with buildings worth \$100,000, but the company has a capitalization of \$25,000. I refer to *Rex v. Pee-Kay Smallwares Limited*, [1947] O.R. 1019 at 1036, [1948] 1 D.L.R. 235, 90 C.C.C. 129, 6 C.R. 28.

As to what constitutes manufacturing, the term does not necessarily contemplate the whole process; every stage in the process is manufacturing. Some help may be derived from *Rex v. Woodhouse*; *Rex v. Timmins* (1926), 31 O.W.N. 263; *Re McGaghran* (1931), 40 O.W.N. 122; *The Mayor, etc. of Guildford v. Brown*, [1915] 1 K.B. 256, and the following American decisions: *Allen v. Smith*; *Smith v. Allen* (1899), 173 U.S. 389; *State v. G. H. Tichenor Antiseptic Co.* (1907), 118 La. 686; *In re Alaska American Fish Co. et al.* (1908), 162 F. 498; *In re Troy Steam Laundering Co.* (1904), 132 F. 266; *Superior Products Co. v. Thomas* (1938), 32 F. Supp. 360.

Section 405(1) of The Municipal Act is an express provision that a tobacco drier is a manufacturing business, and the two statutes, being *in pari materia*, must be read together.

If this company is not a manufacturer, it is at least a wholesale merchant, within s. 8(1)(c) of the Act, since it buys and resells at a profit.

*J. R. Morris, K.C.*, for the respondent, referred also to *The King v. Martin*, [1938] O.W.N. 243, 19 C.B.R. 246 (*sub nom. In re H. Robinson Corporation Limited*), and *Rex v. Sutherland*, 42 B.C.R. 367, [1930] 2 W.W.R. 244, [1930] 4 D.L.R. 183, 54 C.C.C. 313.

*C. R. Magone, K.C.*, for the Attorney-General for Ontario: The attack on the jurisdiction of the Board here is precisely the same as that made in *Re The Michigan State Bridge Commission and The Village of Point Edward*, [1939] O.W.N. 387 at 390, [1939] 3 D.L.R. 533, and should be rejected for the same reason, since it is in effect an argument that the appellant has no right to be before this Court, and that this Court has no jurisdiction to entertain the appeal.

The appellant does not attack the jurisdiction of the court of revision, but obviously it stands in the same position in this respect as the Municipal Board and the County Judge. If none of these tribunals has jurisdiction, we are left with the assessment as originally made by the assessor.

Courts of revision existed before Confederation, but the right of appeal to the Municipal Board was first provided for by 1910, c. 88, s. 18, which gave a right of appeal from the court of revision to the Municipal Board, thus by-passing the County Judge. This was changed by 1913, c. 46, s. 13, to provide for an appeal from the County Judge to the Railway and Municipal

Board. In both statutes there was provision for a further appeal to the Court of Appeal, which was first provided for by 1897, c. 45, s. 70. The 1910 amendment was passed as a result of the decision in *Toronto Railway Company v. The City of Toronto*, [1904] A.C. 809 at 815, C.R. [13] A.C. 324.

Section 129 of The British North America Act, 1867, continued all judicial, administrative and other tribunals then in existence, subject to the possibility of their abolition by the appropriate authority. Courts of revision, before Confederation, were purely administrative, and even with an enlarged jurisdiction they remain administrative. Some of the statutes that are important in connection with the right of appeal are: C.S.U.C. 1859, c. 55, ss. 51, 63; 1866, c. 53, s. 64; 1868-9, c. 36, s. 63; 1874, c. 19, s. 16; 1885, c. 42, s. 16, and the two statutes previously referred to, of 1910 and 1913.

The English statutory provisions are interesting in this connection. The first provision for an appeal to the Courts seems to have been made by The Poor Relief Act, 1743, c. 38, s. 4; before that time assessment appeals were always heard by inferior courts or boards. By the statute 1849, c. 45, s. 11, provision was made for stating a case for the opinion of one of the superior Courts.

In determining whether or not the Board exercises judicial functions, one must look at the old legislation, to ascertain what the jurisdiction was before Confederation. The functions of the court of revision, the County Judge and the Board should all be considered wholly administrative. It is not the exercise of a judicial function to determine which of the definitions in the Act is applicable to a particular business; whether or not the business comes within the definition is a pure question of fact. It may be determined judicially, but that does not make the Board a Court or body exercising the functions of a Court. The cases of *Toronto Corporation v. York Corporation and Attorney-General for Ontario et al.*, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452, and *Re The Adoption Act and Other Statutes*, [1938] S.C.R. 395, [1938] 3 D.L.R. 497, 71 C.C.C. 110, cited for the appellant, are wholly distinguishable. If more power was given in 1910 than had existed before, we must look at the character of that power and determine whether in fact it creates a superior Court.



Even if s. 87 of The Assessment Act provides for the exercise of a judicial function, that function is one which was not exercised by any Court at Confederation, except collaterally, *e.g.*, in an action for trespass or replevin based upon an allegation of illegal assessment. The Board does not necessarily exercise judicial functions merely because it acts judicially: *Shell Company of Australia, Limited v. Federal Commissioner of Taxation*, [1931] A.C. 275, [1931] 2 W.W.R. 231; *Toronto Railway Company v. The City of Toronto*, *supra*.

I refer also to *Sifton v. The City of Toronto*, [1929] S.C.R. 484, [1929] 3 D.L.R. 852; *Village of Hagersville v. Hambleton*, 61 O.L.R. 327 at 328, [1927] 4 D.L.R. 1044; *Re Gordon and The De Laval Company Ltd.*, [1938] O.R. 462 at 468, [1938] 3 D.L.R. 263.

G. D. Watson, K.C., in reply.

*Cur. adv. vult.*

23rd June 1949. ROBERTSON C.J.O.:—This is an appeal by Imperial Leaf Tobacco Company of Canada Limited from the decision of the Ontario Municipal Board, dated 3rd June 1948, allowing an appeal by the municipality from the judgment of His Honour Judge Gordon, of the County Court of the County of Essex, in regard to appellant's business assessment. Appellant was assessed as a manufacturer, at 60 per centum of the assessed value of its land. The court of revision confirmed this assessment on appellant's appeal. On a further appeal to the County Judge the appeal was allowed, and it was held that appellant was not a manufacturer and should be assessed for business assessment at only 25 per centum of the assessed value of its lands, under s. 8(1)(k) of The Assessment Act, R.S.O. 1937, c. 272. On the appeal of the municipality from the order of the County Judge his decision was reversed and the original assessment was restored. It is from that order of the Ontario Municipal Board that appeal is taken to this Court.

There is no conflict in regard to the activities or processes of the appellant in its business or in regard to their purpose or the character and disposal made of what results therefrom. The question is whether, with all these facts before the Court and undisputed, appellant is a manufacturer within the meaning of s. 8(1)(e) of The Assessment Act.

Respondent objects that the matter to be determined on this appeal is neither a question of law nor a question of construction, within s. 84(6) of The Assessment Act, but a question of fact, and that this Court cannot entertain the appeal.

In my opinion this objection is not well taken. The Board, in its decision, relied somewhat upon what was said in the judgment of this Court in the case of *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 4 D.L.R. 145. What was said in the judgment in the *Chatham* case is not relevant here. There was no question before this Court in the *Chatham* case as to the nature or character of appellant's business, and any admission made by counsel in the *Chatham* case was made for the purposes of that case alone. The citing of the *Chatham* case as one to be followed in this case is in itself an error in law, sufficient to support the right of appeal to this Court, and there are other grounds.

For the appellant it was submitted that the Ontario Municipal Board had no jurisdiction to entertain the appeal from the County Court Judge, and that in so far as The Ontario Municipal Board Act, R.S.O. 1937, c. 50, and ss. 84 and 87 of The Assessment Act purport to confer upon the Board capacity to exercise judicial powers by acting as a court of appeal from the decision of the County Court Judge, they are beyond the legislative competence of the Provincial Legislature. This submission was argued at some length before us and counsel for the Attorney-General for Ontario attended on notice and participated in the argument.

As we have reached the opinion that the judgment of the Board cannot be supported, and that the decision of the County Judge should be restored, it becomes unnecessary to discuss the question of the Board's jurisdiction or the validity of the legislation that is questioned.

Having therefore concluded, with all respect to the opinion of the Ontario Municipal Board, that its decision on the appeal from the County Judge cannot be supported, the appeal should be allowed and the decision of the Board should be set aside and the order of the County Judge should be restored. The appellant is entitled to its costs of this appeal. The costs of appeal of the Attorney-General for Ontario should be paid by the appellant.

ROACH J.A.:—This is an appeal by Imperial Leaf Tobacco Company of Canada Limited against a decision of the Ontario Municipal Board, allowing an appeal from the judgment of His Honour Judge Gordon, Senior Judge of the County of Essex, in respect of the business assessment of the appellant in the Township of Mersea, in the County of Essex.

The assessor for the municipality assessed the company for the purposes of business tax as a manufacturer, under s. 8(1) (*e*) of The Assessment Act, R.S.O. 1937, c. 272. On an appeal by the company to the court of revision that assessment was confirmed. The company then appealed to the County Judge, who held that the company should not be assessed for business tax as carrying on the business of a manufacturer, but should be assessed under s. 8(1) (*k*) of the Act as carrying on a business not specifically named in that clause or elsewhere in s. 8(1). The municipal corporation then appealed to the Ontario Municipal Board. The Board reversed the decision of the County Judge and restored the assessment as originally made.

The company, in its notice of appeal, has raised a constitutional question, and, pursuant to s. 32 of The Judicature Act, R.S.O. 1937, c. 100, it notified the Attorney-General for Canada and the Attorney-General for Ontario.

The specific constitutional question raised is that the Ontario Municipal Board had no jurisdiction to entertain the appeal from the judgment of His Honour Judge Gordon in that, in so far as The Ontario Municipal Board Act and ss. 84 and 87 of The Assessment Act purport to confer upon the Ontario Municipal Board capacity to exercise judicial powers by acting as a court of appeal from the decision of a validly appointed County Court Judge, they are beyond the legislative competence of a Provincial Legislature.

Section 84(1) gives to any person who has appealed or was entitled to appeal from the court of revision to the County Judge, and who has been assessed to an amount set out in the section, a further right of appeal to the Ontario Municipal Board.

Section 87 declares that: “. . . the court of revision, the county judge, the Ontario Municipal Board and every court to which and every judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things



are or were assessable or are or were legally assessed or exempted from the assessment.”

It is desirable that at the outset we should have a clear conception of what the question before the court of revision, the County Judge and the Municipal Board was, and to differentiate it from what it was not. The question was not whether the company was assessable for business tax or not. It is conceded that it is assessable for business tax under some classification contained in s. 8(1) of The Assessment Act. Specifically, counsel for the company argues that its business comes within the classification covered by clause *k*. If it were contending that it was not assessable at all, then different considerations would apply. Such a contention would raise a pure question of law, the determination of which would require the exercise of judicial power. Once the company is brought within the Act as being liable to be assessed for business tax, then the problem of classifying it within the Act is a matter of administration. That act of classifying requires the administrative body to make a conclusion of fact. That conclusion of fact is dependent, as I have pointed out in the case between this company and the Village of Delhi, *ante*, p. 636, on a question of law, but it is none the less a conclusion of fact, and the classifying is none the less an administrative act.

The Supreme Court of Canada, in *Re the Jurisdiction of the Tariff Board of Canada*, [1934] S.C.R. 538, [1934] 4 D.L.R. 193, considered a parallel situation arising under the operations of that Board. At p. 548 Rinfret J. (as he then was) said:

“It was argued that every decision of the Board, and more particularly a decision under s. 48, implies: 1—a decision as to value; and 2—a decision as to the rate of duty applicable under the law. And it was contended that, as a necessary consequence, the Board must determine the questions of law which such decisions call for.

“It is obvious, however, that the same remark may equally be made of the local appraisers or of the collectors, when they are called upon to ascertain, estimate and appraise the true and fair market value of goods. In that connection, the local appraisers, when giving their decision, are exactly on a par with the Dominion appraiser or the Board. They also, before making their appraisal, must form an opinion as to the relevant law. But whatever incidental conclusions the appraiser or the Board

must come to in order to arrive at a decision on the proper appraisal to be made, the decision of each or either of them is nothing but the finding of a fact in the particular case." Citing *Girls' Public Day School Trust, Limited v. Ereaut*, [1931] A.C. 12.

The contention of counsel for the company, therefore, amounts to this, that it is beyond the legislative competence of the Provincial Legislature to empower the County Judge to act in an administrative capacity and then to set up another body with administrative functions, in the exercise of which that body may review, amend or, indeed, annul the administrative acts of the County Judge. That contention, of course, must fail, and that ends the constitutional question in this particular case.

The business conducted by the company in the premises here in question, and the use to which it puts those premises, are identical with its business in its plant in the village of Delhi, and the use to which it puts those premises is set out in the case stated in the appeal between that company and the village of Delhi, and need not again be described. Nor is it necessary for me to repeat here what I said in that case. In my opinion, there was here no evidence on which the Board could reasonably classify the business of the company as being that of a manufacturer.

In its reasons the Board refers to the judgment of this Court in *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 4 D.L.R. 145; and says: "If that company is a manufacturer in Chatham, the appellant herein is a manufacturer in Mersea, and should be assessed as such." This Court did not decide that the company in that case was a manufacturer. The company had various premises, (1) its factory proper and (2) the other premises in which it warehoused the tobacco which was processed in its factory. In respect of its factory proper it was assessed as there carrying on the business of a manufacturer, and it did not appeal that assessment. All that this Court held was that since the premises in which it warehoused the tobacco were being used for the purposes of its business as a manufacturer, with respect to them the company should be assessed for business assessment as carrying on the business of a manufacturer.

The appeal should, therefore, be allowed, and it should be declared that the company should be assessed for business assessment as carrying on a business within s. 8(1)(k) of the Act.

The appellant is entitled to its costs of this appeal, and should pay to the Attorney-General for Ontario his costs of this appeal.

AYLESWORTH J.A. agrees with ROBERTSON C.J.O.

*Appeal allowed with costs.*

*Solicitors for the appellant: Smith, Rae, Greer & Cartwright, Toronto.*

*Solicitors for the respondent: Morris & Willson, Leamington.*

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[GENEST J.]

[COURT OF APPEAL.]

**Leonard and Hall v. Crown Trust and Guarantee Company.**

*Trusts and Trustees—Payment of Insurance Premiums on Trust Property—Apportionment as between Life Tenant and Remainderman—The Trustee Act, R.S.O. 1937, c. 165, s. 21(1).*

*Executors and Administrators—Passing of Accounts—Effect of Order of Judge on Audit—Res judicata—The Surrogate Courts Act, R.S.O. 1937, c. 106, s. 69.*

A testator provided that the income from his estate should be paid to his wife for her life, with remainder over. The testator died in 1925, and lands belonging to the estate were not sold until 1946. During the intervening period the executor had at no time enough cash in the capital account to pay fire insurance premiums on estate property, and those premiums were paid out of the income. The executor's accounts were passed in 1930 and 1934, the widow being represented on each occasion, and the Surrogate Court Judge's order on each occasion declared the amount of the income disbursements, including therein the premiums paid. When the lands were sold the widow claimed that the cost of the premiums should be defrayed out of the capital, and after her death her executrices sued to recover that amount.

*Held* (Hogg J.A. *dissenting*), the action must fail. Although under the decision in *Re Rutherford*, [1933] O.R. 707, the premiums should properly have been charged to capital, the orders of the Surrogate Court Judge constituted *res judicata*, and the claim was barred thereby. Although the executors were entitled, under s. 21(1) of The Trustee Act, to pay the premiums out of income, they should have set up their accounts in such a way as to show them as a charge upon the capital account (which showed as overdrawn in the accounts even without them). There was nothing to prevent the widow, on the audits, from objecting to the accounts on the ground that that had not been done, and since she had not done so the question was concluded against her.

AN APPEAL by the plaintiffs from the judgment of Genest J., *infra*, dismissing the action.

29th April 1948. The action was tried by GENEST J. without a jury at Peterborough.



*A. L. Elliott, K.C.*, for the plaintiffs.

*T. J. Carley, K.C.*, for the defendant.

22nd February 1949. GENEST J.:—This is an action brought by the plaintiffs to recover the sum of \$5,868.90 from the defendant on the ground that this sum was expended by the defendant for insurance premiums on real estate and wrongly paid out of the income of the estate instead of being charged to capital, to the detriment of the plaintiffs.

F. L. Robinson, late of the city of Peterborough, died on or about the 8th June 1925. The plaintiffs are the executrices of his widow, Rachel Robinson, who died on the 25th August 1947. The defendant is the executor of the said F. L. Robinson.

By the terms of the will of the said F. L. Robinson his widow, Rachel Robinson, was entitled to the income from lands situate in the city of Peterborough. It is alleged and admitted that the executor of the said F. L. Robinson paid out for insurance premiums on the said property (made up of fire and plate glass insurance) during the period from 8th June 1925 to 31st May 1934 the sum in question, namely, \$5,868.90. This sum was paid out of income. In 1946 the said lands, which were valued at the time of death at \$40,000, were sold for \$85,000.

At various times the accounts of the estate were passed before the Surrogate Court Judge. Particularly, on the 6th September 1934 the learned judge of the Surrogate Court of the County of Peterborough audited the accounts and made an order dated the 11th December 1934. The accounts showed as payments out of income the said sum of \$5,868.90 for insurance premiums. The judge made the following findings and declarations:

“I FIND AND DECLARE the total estate of the said deceased which has come into the hands of the said executor from the thirtieth day of April 1930 to the thirty first day of May 1934 amounts to \$23,512.92, \$15.00 of which is Capital and \$23,497.92 is income, the latter including \$3,354.17 balance of income brought forward from prior audit:

“AND I FIND AND DECLARE that the said executor has properly paid out and disbursed in the due course of administration of the said estate from the thirtieth day of April 1930 to the thirty first day of May 1934 the sum of \$22,098.69, \$7,066.15 of which is capital and \$15,032.54 of which is income, the disbursements of Capital include the debit balance of \$2,139.15 from prior audit.”

The plaintiffs alleged that according to law these premiums should be charged to capital. Section 21(1) of The Trustee Act, R.S.O. 1937, c. 165, reads as follows:

"A trustee may insure against loss or damage by fire, tempest or other casualty any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three-fourths of the value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income."

In connection with this section there is a decision of the Court of Appeal, *Re Rutherford*, [1933] O.R. 707, [1933] 4 D.L.R. 222, in which Mr. Justice Middleton made the following observation as set forth in the headnote to the report at p. 708:

"Section 21 of the Trustee Act, R.S.O. 1927, ch. 150, gives to the trustee the right to resort to income for the purpose of making the payment for fire insurance premiums, but it does not interfere with the right of the life-tenant to contend that some portion of the fire insurance premiums should be borne by the reversioner. There should be an apportionment of the insurance premiums between income and capital in proportion to the value of the life-tenancy as compared with the value of the reversion."

There was possibly some doubt about the law at the time of the passing of the accounts, but it would appear that these premiums should have been charged to capital. On the other hand, I do not think it is necessary to consider this point because of the defence set up that the claim by the plaintiffs is *res judicata* between the parties because of the findings of the learned judge of the Surrogate Court quoted above.

It was alleged that the judge merely approved the receipts and disbursements put before him and accepted their classification as capital or income as made by the executors in preparing their accounts and did not decide the moot point, but I cannot agree with this contention. One must consider the powers given to the Surrogate Court Judge by s. 69 of The Surrogate Courts Act, R.S.O. 1937, c. 106. He has power to decide whether payments are income or capital and in this case he did so decide when he used the words "[so much] of which is capital and [so much] of which is income". By these words

he definitely decided judicially that the amounts comprised in the totals he mentioned were either capital or income and as the payments complained of, made for premiums, were included in the statement of income disbursements, he found and decided that they had been properly made as such. The plaintiffs, or their predecessors, could have, and should have, if they wished to contest it, made their objections at that time.

In consequence I must hold that the question has been judicially decided as between the parties and that it cannot now be inquired into further by another Court.

The action will be dismissed with costs.

*Action dismissed with costs.*

13th June 1949. The appeal was heard by HOGG, AYLESWORTH and BOWLBY JJ.A.

A. A. Macdonald, K.C., for the plaintiffs, appellants: The executor was entitled to pay the premium out of income in the first place (there being no cash available in the capital account) by virtue of s. 21(1) of The Trustee Act, R.S.O. 1937, c. 165, but as between the life tenant and the remainderman the premiums should be charged to capital rather than to income: *Re Rutherford*, [1933] O.R. 707, [1933] 4 D.L.R. 222. To raise the point on the two earlier audits would have been academic. All the Surrogate Court Judge could have done would have been to add a declaration that the widow's rights should be preserved. That would have been redundant, since the law gives her the rights in any event.

For the principle of *res judicata* to apply, the point must be one which was set up and adjudicated upon in the prior proceedings. All that the Surrogate Court Judge dealt with was the accounts, which were in order. His order is final as to all matters upon which he properly passed: *Johanesson v. Canadian Pacific Railway Company*, [1922] 2 W.W.R. 341, 66 D.L.R. 599, affirmed 32 Man. R. 210, [1922] 2 W.W.R. 761, 67 D.L.R. 636, but only as to those matters. [AYLESWORTH J.A.: When an executor files and passes his accounts, is that not putting in issue everything that he has done, and is not that the only time for a person who has been notified of that audit to question the accounts?] This question was not put in issue, and the accounts were correct because of s. 21(1) of The Trustee Act. The Court should consider the formal judgment and the reasons therefor,



to determine what points were in issue: 13 Halsbury, 2nd ed. 1934, paras. 464-6, pp. 408 *et seq.*; *Wahl v. Nugent*, [1924] 1 W.W.R. 939, [1924] 2 D.L.R. 97 at 99, reversed 18 Sask. L.R. 592, [1924] 2 W.W.R. 1138, [1924] 3 D.L.R. 679.

*T. J. Carley, K.C.*, for the defendant, respondent: It is important to see how the accounts were set up at the outset. It is obvious that the payments could have been charged to capital. It is true that there was not always sufficient cash in the capital account to pay them, but they need not have been charged to income in the accounts, since the capital account was always overdrawn. The differentiation was made in other respects, and could have been made in the case of these premiums, if the matter had been raised.

The order on passing accounts is binding on any person present or represented at the audit, and upon everyone claiming under such a person, unless fraud or mistake is shown: The Surrogate Courts Act, R.S.O. 1937, c. 106, s. 69(1). This matter was never raised on the previous audits, and when it was raised on the final audit there was no question as to arrears. Section 21(1) of The Trustee Act says that the premiums may be paid out of income, not that they may be charged to it.

I refer to Widdifield on Executors' Accounts, 4th ed. 1944, pp. 450 *et seq.*

*A. A. Macdonald, K.C.*, in reply: There is no significance in the use of the word "pay" rather than "charge" in s. 21(1). When a payment is made out of income, it is obviously charged to income. The orders on the audits fall far short of an adjudication within the meaning of s. 69(1) of The Surrogate Courts Act. The judge in 1947 could not revise what had been done earlier.

*Cur. adv. vult.*

24th June 1949. HOGG J.A. (*dissenting*):—An interesting point has arisen in this appeal against the judgment of Mr. Justice Genest dismissing the appellants' action against the respondent. The facts are simple and are not in dispute. The problem before the Court for solution is concerned solely with a matter of law.

Frederick Lockhart Robinson died on the 30th May 1925, and probate of his will was granted on the 18th July 1925 to

the predecessor of the respondent company. Certain pecuniary legacies are bequeathed by the will and the testator directs that these said bequests may be paid out of the income of the estate if there should not be sufficient cash on hand at the time of the testator's death to pay these legacies. All the residue of the estate is devised to the executors in trust for the use and benefit of the testator's wife, Rachel Robinson, for her life, or until she remarries, and after the widow's death or remarriage the residue is divided among the beneficiaries mentioned in the will. Para. 7 of the will reads:

"If at any time during the life of my said wife it seems best to her and to my said executors that any part of my said estate should be sold and converted, I hereby empower my said executors to sell and convert the same so long as the proceeds are invested in accordance with the Trustee Act."

On the 30th June 1930 accounts of the estate were passed before His Honour Judge Huycke of the Surrogate Court of the County of Peterborough, and the order, which bears the same date, recites that among those who were present was Mr. W. F. Huycke, solicitor for Mrs. Robinson. The order sets out that the executor had properly disbursed \$20,753.34 income and \$8,652.76 corpus, and that the capital account was overdrawn to the extent of \$2,139.15. The income of the estate consisted almost entirely of the rents from land and buildings thereon in the city of Peterborough. The respondent, as executor of the estate, paid out for insurance premiums for insurance upon the aforesaid buildings during the period from 8th June 1925 to 31st May 1934, according to the statement of claim in the present action, the sum of \$5,868.90, which said sum was paid out of the income of the estate.

The accounts of the executors were again passed before His Honour Judge McGibbon on the 11th December 1934, in the presence, among others, of the solicitor for Mrs. Robinson. The accounts show that the insurance premiums were again paid out of income. The order states that the total estate which had come into the hands of the executor from the 30th April 1930 to the 31st May 1934 amounted to \$23,512.92, of which sum \$15 was capital and \$23,497.92 was income. The order sets out that in the period above mentioned the executor properly disbursed the sum of \$22,098.69, "\$7,066.15 of which is capital and \$15,032.54 of which is income". The learned Surrogate

Court Judge found that the capital account was overdrawn to the extent of \$7,384.15, and the executor was permitted to charge this overdraft in the capital account against income. The disbursements of capital included a debit balance from a prior audit. The sole receipt of capital during the period in question was the aforesaid \$15, representing a claim for loss by fire.

Although the amount due for insurance premiums was charged to and paid out of income in the accounts passed at both the audits, it is to be observed that even then the capital receipts did not meet the disbursements charged to capital.

On the 7th January 1947 the accounts of the estate were again passed before His Honour Judge Smoke. During the period covered by the accounts passed in 1947 the premiums for insurance were charged to and paid out of the capital of the estate. The lands in question, from which the rents were derived, were sold by the respondent in the year 1946 for the sum of \$85,000. Mrs. Rachel Robinson, the widow of the testator, then made demand upon the respondent for the payment to her of the said sum of \$5,868.90, paid by the respondent on account of insurance premiums during the period from 8th June 1925 to 31st May 1934 and commenced action for the said amount against the respondent executor on the 26th July 1947. Mrs. Robinson died on the 25th August 1947, and the appellants, the executrices of her last will and testament, obtained an order that the cause might be continued in their names as executrices.

The respondent in its statement of defence pleaded that the appellants were estopped from contesting the correctness of the audits or passing of the accounts of the 30th June 1930 and the 11th December 1934, and pleaded that the appellants were bound by the aforesaid orders. The action came on for trial before Mr. Justice Genest on the 29th April 1948. The learned trial judge was of the opinion that it would appear that the insurance premiums in question should have been charged to the capital of the estate, but said: "On the other hand, I do not think it is necessary to consider this point because of the defence set up that the claim made by the plaintiff is *res judicata* between the parties because of the findings of the learned judge of the Surrogate Court quoted above." He held that the Surrogate Court Judge had power to decide whether payments were income or capital and "did so decide when he used the words, '[so much] of which is capital and [so much] of which is



income.' By these words, he definitely decided judicially that the amounts comprised in the totals he mentioned were either capital or income and as the payments complained of, made for premiums, were included in the statement of income disbursements, he found and decided that they had been properly made as such. The plaintiffs, or their predecessors, could have, and should have, if they wished to contest it, made their objections at that time."

By s. 21 of The Trustee Act, R.S.O. 1937, c. 165, a trustee is given power to insure any insurable property against fire, tempest or other casualty, for an amount not exceeding three-quarters of the value of such property, "and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income".

In *Re Rutherford*, [1933] O.R. 707, [1933] 4 D.L.R. 222, one of the questions before the Court of Appeal was whether the amount of certain fire insurance premiums should be charged to the capital of the estate instead of to the income thereof. The will with which the action was concerned directed that the whole of the income from the residue of the testator's estate should be paid to his widow during her natural life. The Surrogate Court Judge had ordered that the insurance premiums should be charged to capital and the Official Guardian entered an appeal. The widow of the testator moved for an order, *inter alia*, that the real estate of the testator should be sold. The motion and the appeal were heard by Rose C.J.H.C., who decided that the insurance premiums in question should be charged to income. Upon an appeal to this Court it was held that fire insurance premiums are essentially a capital outlay and should be borne out of capital. The Court consisted of Mulock C.J.O. and Magee and Middleton J.J.A. Mr. Justice Magee, referring to fire insurance premiums, said at p. 723:

"They are a speculative outlay of capital to assure the continuance of capital and are not the less capital outlay because the capital return which they may bring will like other capital produce income."

Again at p. 724, referring to s. 21 of The Trustee Act, the learned judge said: "But while the Act [The Trustee Act, s. 21] thus enables a trustee to resort to that income for the funds

needed it does not provide that the cost is ultimately to be borne by the person entitled to that income in the adjustment of the rights of the parties. It can not be thought that the Legislature intended to do what was always recognized as an injustice in trying to do something for the benefit of all."

Middleton J.A. was of the opinion that the said s. 21 of The Trustee Act, although giving to the trustee the right to resort to income for the purpose of making the payment for fire insurance premiums, did not interfere with the right of the life tenant to contend that fire insurance premiums, or at least some portion of them, should be borne by the reversioner.

It is true that the orders of the Surrogate Court Judges made in 1930 and 1934 were proper orders to have been made at the time because of the circumstances then existing. The Trustee Act gave the executor the right to charge the insurance premiums against income. During the years covered by the passing of the accounts there had not been sufficient capital available in the form of money or cash to pay the premiums, as the property of the estate had not been sold, and as a consequence a demand upon the part of the life tenant to have these premiums paid from capital was one which could not, with reason, be made by her, upon the passing of the accounts of her husband's estate.

At the time there was no issue before the Surrogate Court as to whether the premiums should be charged to, and paid from, capital, as they would properly have been charged if sufficient capital in the form of cash had been available to pay these premiums. The question of charging premiums against capital did not, in my opinion, then arise, and the present demand did not arise until the sale of the real estate. When that was accomplished in 1946, the position of the parties was altered, and a new issue arose. The life tenant could then request that the income of the estate, to which she was entitled under the terms of the will, should not bear the cost of the insurance premiums. As was said by Magee J.A. in *Re Rutherford*, the authority given by The Trustee Act, to resort to income for funds needed, does not provide that "the cost is ultimately to be borne by the person entitled to that income in the adjustment of the rights of the parties." When the real estate was sold in 1946, there were then ample funds to satisfy all of the moneys paid for fire insurance, and the position of the parties was changed. The life

tenant then demanded that the cost of the insurance premiums should not ultimately be borne by her and claimed that the income of the estate be implemented by the amount formerly paid out of such income to satisfy the said premiums.

There are two matters of law which arise for consideration in this appeal. Firstly, what is the effect of s. 69 of The Surrogate Courts Act, R.S.O. 1937, c. 106?

Subs. 1 of s. 69 is as follows: "Where an executor, administrator, trustee, under a will of which he is an executor, or a guardian, has filed in the proper surrogate court an account of his dealings with the estate, and the judge has approved thereof, in whole or in part, if he is subsequently required to pass his accounts in the Supreme Court such approval, except so far as mistake or fraud is shown, shall be binding upon any person who was notified of the proceedings taken before the surrogate judge, or who was present or represented thereat, and upon every one claiming under any such person."

Subs. 3, which embraces the amendment made by 5 Edw. VII, c. 14, gives the judge on a passing of accounts all of the power which may be exercised in the Master's office under an administration order, and subs. 4 gives further powers to the Surrogate Court Judge which I do not think are relevant to the issues raised in this appeal.

With reference to subs. 1 of s. 69 of the statute, it is in the event of an executor, after the account of his dealings with the estate has been approved on the passing of accounts by a Surrogate Court Judge, being subsequently required to pass his accounts in the Supreme Court in the Master's office, that the former approval by the Surrogate Court Judge is binding upon any person who was notified of the proceedings taken before him, or who was present or represented upon the passing of accounts. In the present case, the evidence establishes that the respondent would not be required to pass its accounts in the Supreme Court.

At the close of the trial there was a discussion between the learned trial judge and counsel for both parties, as to the exact amount of the appellants' claim. Mr. Elliott, who acted for the appellants at the trial, stated that the claim, after certain adjustments had been made, stood at the sum of \$5,874.66. Mr. Carley pointed out that there was a further error of \$10. Mr. Elliott



then stated the sum of \$5,864.66. The learned trial judge agreed that "that is how the account stands now".

In *Gibson v. Gardner* (1906), 13 O.L.R. 521, s. 72 of The Surrogate Courts Act, R.S.O. 1897, c. 59 (now s. 69) was under consideration. The accounts of an executor had been passed in the Surrogate Court in the presence of the plaintiff in the action with which the appeal was concerned. The plaintiff subsequently brought action in the High Court for the removal of an executor and for the taking of an account of certain of the personal estate of the testator. An order was made on consent appointing a new executor and directing an account, as requested, to be taken. Upon the matter coming before the Master-in-Ordinary he held that, the account having been passed by the Surrogate Court Judge, and there being no fraud or mistake, the plaintiff was, under s. 72 of the Act, bound by the account. At p. 525 the Master-in-Ordinary said:

"The effect of this section is to limit the jurisdiction of the High Court in taking and passing executor's accounts; and being worded: 'shall be binding,' must be classed as an imperative enactment, and also, I think must be held to be incorporated into the consent judgment and therefore limiting the jurisdiction of the Court in taking the accounts referred. . . . I must therefore give effect to the statutory mandate and hold that the approval of the defendant executor's accounts of his dealings with the estate of which he is the executor, given in the presence of the solicitor representing the plaintiff and set out in the order of the surrogate Judge, dated the 31st January, 1901, is binding on the said plaintiff in these proceedings in the High Court."

Chancellor Boyd heard the appeal from the Master's judgment and in giving judgment he said, at p. 526:

"R.S.O. 1897, ch. 59, sec. 72, is that the account of the dealing of the executor with the estate being filed and approved of by the Judge, shall be binding upon any person notified and attending on the proceedings in any subsequent investigation of the account in the High Court—except in so far as mistake or fraud is shewn in the account so approved.

"This investigation is substantially an auditing of the accounts, . . ."

An appeal was taken to the Court of Appeal and the judgment of the Master-in-Ordinary was affirmed. In the present

action no subsequent passing of accounts in the High Court is required.

I do not think the appellants are barred by s. 69 from now being entitled to recover the amount charged to and paid out of the income of the real estate of the Robinson estate.

There now remains the question whether the principle of estoppel known as *res judicata* is a bar to the appellants' claim.

There is no complaint made by the appellants that the orders made on the passing of the accounts of the executors in 1930 and 1934 should not then have been made. The right existed by virtue of s. 21 of The Trustee Act to charge insurance premiums against the income of the estate, and capital, in the form of cash from which they might have been paid, did not exist in sufficient amount. No ground for appeal from the passing of the accounts then existed. The circumstances present at the time of the passing of the accounts warranted the judge in charging the said premiums to income, but the approval of the payment of insurance premiums from income did not settle the matter for all time. The statute permitting income to bear this charge does not—again using the words of Mr. Justice Magee—"provide that the cost is ultimately to be borne by the person entitled to that income in the adjustment of the rights of the parties".

The designation by the Surrogate Court Judge that a certain amount paid is capital and a certain amount is income could not, in my opinion, take away a right which the life tenant had but which could not be fulfilled at that time because of lack of capital in the form of money.

Idington J., speaking of the approval by a Surrogate Court Judge of an executor's accounts, said in *Re Russell* (1904), 8 O.L.R. 481: "These beneficial provisions for keeping of record evidence to protect an executor never were intended to be a means of harassing him."

It was said by Wigram V.C. in the often-cited case of *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313, that the plea of *res judicata* applies to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

Upon the passing of the accounts the question whether the insurance premiums should have been paid out of capital did

not arise as there had not been sufficient capital available to pay the premiums in full. The real estate had not then been converted into money and the question of charging premiums to capital account was not a "point which properly belonged to the subject of litigation", nor did it so belong until the sale of the real estate in the year 1946. At once the position of the parties altered and a new issue arose. The appellant then could, with reason, demand for the first time that the sum paid for insurance premiums out of the income derived from the rents of the real estate should be repaid from the capital which had then become available in sufficient amount, in the form of cash.

13 Halsbury's Laws of England, 2nd ed. 1934, pp. 411-2, contains the following exposition of the law on the matter under discussion:

"In order that a defence of *res judicata* may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second. . . .

"The doctrine applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But if there be matter subsequent which could not be brought before the Court at the time, the party is not estopped from raising it."

It does not seem to me that the life tenant had an opportunity, on the earlier passing of accounts, of having the payment of insurance premiums charged to capital although she had a right to the income, because so to charge then would have further overdrawn the capital account, already greatly overdrawn.

In the comparatively recent case of *Cohen v. S. McCord & Co. Limited*, [1944] O.R. 568, [1944] 4 D.L.R. 753, Mr. Justice Gillanders referred to a statement made by Middleton J.A. in *Rex v. Manchuk (Munchuk)*, [1938] O.R. 385 at 424 (reversed on other grounds [1938] S.C.R. 341, [1938] 3 D.L.R. 693, 70 C.C.C. 161), referring to the principle of *res judicata*, and said at p. 571: "Applying that here, it is apparent that the issue now raised was never previously 'directly determined by a court of competent jurisdiction'."



In *Stuart v. Mott* (1894), 23 S.C.R. 384, an action had been brought for the performance of an alleged agreement by the defendant to give the plaintiff an interest in a mine. The defendant denied the agreement but admitted that he had promised to give the plaintiff an interest in the proceeds of the sale of the mine. The action was dismissed because the agreement was not enforceable under The Statute of Frauds. The mine was subsequently sold and an action was brought by the same plaintiff for a share of the proceeds, to which claim the defence set up the doctrine of *res judicata*. It was held that the plaintiff was not estopped. Strong C.J. said, at p. 388:

“Two points of law were raised. First, it was said that the judgment in the first suit was an estoppel. But one of several answers which suggest themselves is sufficient to dispose of this. We cannot say that there was *res judicata* inasmuch as the present demand did not arise until the sale of the mine had been completed, and this was not effected until after the final judgment in appeal by which the first suit was disposed of was pronounced.”

The rule set out in this judgment is, in my opinion, applicable to the present facts. The demand of the appellants to have the insurance premiums paid out of capital instead of income did not arise until the sale of the real estate, because before the sale money was not available, except out of income, for the purpose. After the sale of the real estate the position of the parties had altered.

In *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141, Bowen L.J., in discussing the subject of *res judicata*, said, at p. 147: “The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit.” He further said: “It is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance.”

The judgment in *Re Rutherford*, *supra*, indicates that the character of finality could not be intended with respect to orders made on the passing of accounts charging insurance premiums to income where money had not been available, except from income, to pay such premiums, because the judgment in that case holds that the power given by The Trustee Act with respect

to insurance premiums does not mean that the cost of such premiums shall ultimately be borne by the person entitled to the income of an estate.

In my opinion this judgment means that the power given to a Surrogate Court Judge on the passing of accounts to declare that income should be fixed with the payment of insurance premiums is not a final disposition of the matter and does not override the right of a donee of the income to receive such income—not the income less the cost of the insurance—when funds are on hand derived from the capital assets of the estate sufficient in amount to reimburse the recipient of the income for such part of it as was necessarily expended on insurance premiums at the time they fell due.

Such being the case I am of the opinion that the widow of the testator was not required to raise the claim that is now made by her representatives upon the passing of the accounts in 1930 and 1934 in order to preserve a right she had at law to have insurance premiums ultimately paid from capital. I think that the form of the orders on the passing of accounts, the substance of the matter not having been dealt with, does not estop or preclude the appellants from now setting up this claim.

My conclusion is that the appeal should be allowed and that there should be judgment for the appellants for the sum of \$5,864.66 against the estate of the late Frederick Lockhart Robinson, with costs of the trial and of the appeal to be paid out of the estate.

AYLESWORTH J.A.:—This is an appeal from the judgment of the Honourable Mr. Justice Genest dated 22nd February 1949, dismissing the plaintiff's action with costs. The question in issue in the appeal is the right of the plaintiffs, as executrices of the widow of F. L. Robinson, deceased, to recover from the respondent as executor of the said Robinson an amount represented by insurance premiums paid by the respondent on the deceased's real estate and alleged to have been wrongfully charged by respondent to the income of the estate rather than to the capital thereof.

Respondent upon three separate occasions, namely, in 1930, 1934 and 1947, duly presented and passed its accounts before the Surrogate Judge upon notice to the widow or her successors.

The widow or her successors were duly represented upon each passing. It is the administration by respondent in connection with the charging of the above-mentioned premiums during the periods covered by the first two passings which it is now sought to challenge; upon the most recent passing respondent's administration was challenged before the Surrogate Court Judge and the contention of the appellants was thereupon acceded to by the Surrogate Judge with respect to the accounting period then under review and the insurance premiums for that period were accordingly charged *in toto*, as I understand it, to capital and not to income.

In my view this appeal may be disposed of upon the ground adopted by the learned trial judge in disposing of the trial. I quote in part his reasons for judgment:

"It was alleged that the judge merely approved the receipts and disbursements put before him and accepted their classification as capital or income as made by the executors in preparing their accounts and did not decide the moot point, but I cannot agree with this contention. One must consider the powers given to the Surrogate Court Judge by s. 69 of The Surrogate Courts Act, R.S.O. 1937, c. 106. He has power to decide whether payments are income or capital and in this case he did so decide when he used the words '[so much] of which is capital and [so much] of which is income.' By these words he definitely decided judicially that the amounts comprised in the totals he mentioned were either capital or income and as the payments complained of, made for premiums, were included in the statement of income disbursements, he found and decided that they had been properly made as such. The plaintiffs, or their predecessors, could have, and should have, if they wished to contest it, made their objections at that time.

"In consequence I must hold that the question has been judicially decided as between the parties and that it cannot now be inquired into further by another Court."

The executor, upon the passing of its accounts, was not required merely to make due account for receipts for disbursements and for the balance, if any, in its hands, but was required in addition to justify its "administration" in connection with such receipts and disbursements as to crediting or charging the same respectively to income and to capital, where, under the terms of the will, that is of importance. In other words, the



administration by the executor in this sense was directly put in issue upon the passing of the executor's accounts and the order made upon the passing was binding upon those who had due notice of the passing, subject to their right to appeal from the order of the Surrogate Judge.

I think the learned judge was right and for the reasons given by him and I would dismiss the appeal. While under s. 21(1) of the Trustee Act, R.S.O. 1937, c. 165, the executor was entitled to pay the insurance premiums in question out of the income of the estate, this did not preclude the executor from so setting up its accounts as to reflect a charge for such premiums against capital in whole or in part and objection to its not having done so could and should have been made before the Surrogate Judge at the time of the passing of the executor's accounts.

In the circumstances I would make no order as to costs of the appeal save to direct that the respondent may have its costs out of the estate of F. L. Robinson, deceased, as between solicitor and client.

BOWLBY J.A. agrees with AYLESWORTH J.A.

*Appeal dismissed, HOGG J.A. dissenting.*

*Solicitors for the plaintiffs, appellants: Elliott & Chandler, Peterborough.*

*Solicitors for the defendant, respondent: Carley & Standish, Peterborough.*

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[COURT OF APPEAL.]

**The Northern Broadcasting Company Limited v. The Improvement District of Mountjoy.**

*Taxation—Municipal Real Property Assessment—What Property Assessable—Definition of “land”, “real property” and “real estate”—Equipment of Radio Broadcasting Station—The Assessment Act, R.S.O. 1937, c. 272, ss. 1(i) (iv), 4(17).*

The appellant company owned and operated a radio broadcasting station on land of which it was the lessee. The station comprised a small building, towers with antennae, a system of ground wires, and a transformer and a transmitter. The two last-named pieces of equipment stood on the floors of the building, held in place by their own weight, and connected only by wires and other connections with other parts of the equipment.

*Held* (AYLESWORTH J.A. *dissenting*), the transformer and transmitter, as well as the towers and ground wires, were assessable, since they came squarely within the definition of “land”, “real property” and “real estate” in s. 1(i) (iv) of The Assessment Act. *Stack v. T. Eaton Co. et al.* (1902), 4 O.L.R. 335; *Re City of Ottawa and Ottawa Electric Railway Co.* (1922), 52 O.L.R. 664; *Re Ford Motor Co. of Canada Ltd. and Town of Ford City*, 63 O.L.R. 410, affirmed [1929] S.C.R. 490, considered.

AN APPEAL from a decision of the Ontario Municipal Board, fixing at \$11,000 the assessment of the appellant for machinery and equipment.

6th May 1949. The appeal was heard by LAIDLAW, HOPE and AYLESWORTH JJ.A.

*H. E. Manning, K.C.*, for the appellant: The difficulty in this case arises from the words “placed upon” land in s. 1(i) (iv) of The Assessment Act, R.S.O. 1937, c. 272. My submission is that these words must mean the same as erected upon or affixed to the land. Otherwise, all chattels in Ontario would be assessable as land under the Act. The transmitter and transformer were not affixed to the building in any way, but were resting by their own weight on the floor. The building would not be damaged by their removal. In addition, the chattels were placed there for the more convenient use of the machines themselves, as chattels. There is therefore no presumption that they have become part of the land: I refer to *Stack v. T. Eaton Co. et al.* (1902), 4 O.L.R. 335; *Haggert v. The Town of Brampton et al* (1897), 28 S.C.R. 174; *Re Ford Motor Co. of Canada Ltd. and Town of Ford City*, 63 O.L.R. 410, [1929] 2 D.L.R. 109, affirmed *sub nom. The Town of Ford City v. The Ford Motor Company of Canada, Limited*, [1929] S.C.R. 490, [1929] 4 D.L.R. 597; *Ottawa Electric R.W. Co. v. City of Ottawa* (1907), 10 O.W.R.

138; *The City of Vancouver v. The Attorney General of Canada et al.*, [1944] S.C.R. 23, [1944] 1 D.L.R. 497.

*D. D. Carrick*, for the respondent: Section 1(i) (iv) of The Assessment Act expressly refers to things "affixed to" land, and attachment even by means of wires, as in this case, is enough: *Re City of Ottawa and Ottawa Electric Railway Co.* (1922), 52 O.L.R. 664; *The Town of Ford City v. The Ford Motor Company of Canada, Limited*, *supra*; *Re Marley & Sandwich* (1932), 41 O.W.N. 178; *Hiram Walker & Sons Limited v. The Town of Walkerville*, [1933] S.C.R. 247, [1933] 3 D.L.R. 433; *Re The Michigan State Bridge Commission and The Village of Point Edward*, [1939] O.W.N. 387, [1939] 3 D.L.R. 533.

Further, this equipment is machinery used for the transmission of electricity, and is therefore taxable under s. 4(17) of the Act.

*H. E. Manning, K.C.*, in reply.

*Cur. adv. vult.*

20th June 1949. LAIDLAW J.A.:—I agree with my brother Hope that this appeal should be dismissed with costs. The reasons given by him amply support that order, but I respectfully take the liberty of making reference to certain evidence and facts which to some extent, influence my opinion.

The equipment necessary for the broadcasting station of the appellant included the transformer and transmitter. The plant is a "tailor-made job". It was specially planned by the president of the appellant company and the engineers of the manufacturers of the equipment. It fitted a certain regulation laid down internationally and "it wouldn't fit any other set of circumstances or regulations". The life of the plant, "studio and everything", according to the evidence, is from five to seven years, and would be completely expended before the expiration of the term of the leases of the land held by the appellant. While in one sense the transformer and transmitter are moveables, they are, nevertheless, integral parts of the broadcasting plant. There was no intention whatsoever on the part of the owners when they installed those items of equipment, or at any time afterwards, to regard them as chattels, but rather as part and parcel of the real property. For the purpose of assessment and taxation, they fall squarely within the definition of "land", "real property" and "real estate" as set forth in s. 1(i) (iv)



of The Assessment Act, R.S.O. 1937, c. 272, and do not fall within the exemption contained in s. 4(17).

HOPE J.A.:—The appellant has appealed from that part of the judgment of the Ontario Municipal Board dated the 9th March 1949 which fixes the assessment of the appellant for certain machinery and equipment at the sum of \$11,000.

On the 12th August 1948 the improvement district assessed the appellant on part of Lot 10, concession 2, of the district of Mountjoy, for the sum of \$100, and the buildings thereon at \$27,500. The appellant appealed therefrom on the ground of over-assessment.

The property assessed is situate in the improvement district of Mountjoy, about seven miles from the town of Timmins.

The appellant is the lessee by assignment of the parcel of land for a period of ten years from the 15th February 1946, with the privilege of constructing any buildings, structures or fixtures on the land, and the right to remove the same. Additional and adjacent property is under lease from another lessor, but on the same terms, with the additional right to renew this latter lease for four years.

In 1947 the appellant completed the erection of a house on the property, and erected three towers bearing broadcasting antennae. Programmes transmitted through the broadcasting station originate in the town of Timmins, and are carried by special telephone wires to the property assessed, where, by means of a radio transmitter, they are propelled through the air.

In the basement of the building erected on the premises there is a transformer which receives electric power from a hydro-electric service line. On the ground floor of the building is a transmitter which receives current from the transformer, imposes the programme on a carrier wave, and, through wires in a conduit connected with each tower, sends the waves to the towers from which they are radiated through the surrounding area.

The original assessment was sustained by the court of revision of the district, from which an appeal was taken to the Ontario Municipal Board. The Ontario Municipal Board confirmed the assessment on the land, reduced the assessment on the buildings from \$10,000 to \$2,500, and reduced the assessment on the towers, ground system, transmitter and transformer

from \$20,300 to \$11,000. It is from this portion of the judgment of the Board only that the appellant appeals.

The appeal is on the ground that the towers, ground system, transmitter and transformer are not land or real property assessable under The Assessment Act, that there was no evidence to justify the Board in reaching the conclusion that they were land within the meaning of The Assessment Act, and that the assessment was made without jurisdiction over the subject-matter involved.

The evidence discloses without question that the towers and the ground system are attached to and form part of the land. The transmitter and transformer rest upon the ground floor and basement floor, respectively, of the building upon the land, only by their own weight, and are attached to the towers and ground system only by means of wires and attaching connections.

On the appeal, the appellant confined argument only to the transformer and transmitter.

The respondent bases its right of assessment on these last-named pieces of machinery on the following provisions of The Assessment Act, R.S.O. 1937, c. 272 and amending Acts, s. 1 of which Act, in clause (i), defines as follows:

“‘Land,’ ‘real property’ and ‘real estate’ shall include: . . .

“(iv) All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land”.

Other provisions of the Act which are pertinent hereto are in s. 4(17) which reads:

“All real property in Ontario and all income derived, whether within or out of Ontario, by any corporation, or received in Ontario on behalf of any corporation, shall be liable to taxation, subject to the following exemptions:

“17. All fixed machinery used for manufacturing or farming purposes, including the foundations on which the same rests; but not fixed machinery used, intended or required for the production or supply of motive power including boilers and engines, gas, electric and other motors, nor machinery owned, operated or used by . . . a person having the right, authority or permission to construct, maintain or operate within Ontario in, under, above, on or through any highway, lane, or other public communication, public place or public water, any structure or other

thing, . . . for the purpose of conducting steam, heat, water, gas, oil, electricity or any property, substance or product capable of . . . transmission . . . for the supply of . . . power, or other service.”

The appellant relied on the assertion that the transformer and transmitter are chattels, and are not, in any sense of the law, fixtures, so as to be assessable as real property.

A number of cases were cited by counsel for the appellant relative to the law of fixtures, but I am of the opinion that these cases are not applicable to the facts here present, and the existing statute law.

The provision of The Assessment Act prior to the enactment of s. 1(i) (iv) declared “real estate” to include “all buildings or other things erected upon or affixed to the land, and all machinery or other things so affixed to any building as to form in law part of the realty”. This statutory definition of real estate was only a recognition of the well-settled law relating to fixtures as stated by Meredith C.J.C.P. in *Stack v. T. Eaton Co. et al.* (1902), 4 O.L.R. 335. The amended provision of The Assessment Act now prevailing as found in s. 1(i) (iv) goes beyond the inclusion of fixtures which “form in law part of the realty”.

It is stated by Rose J. in a judgment of the Appellate Division in *Re City of Ottawa and Ottawa Electric Railway Co.* (1922), 52 O.L.R. 664 at 671:

“Speaking generally, the scheme of the present Assessment Act, R.S.O. 1914, ch. 195, is that taxes shall be levied upon the whole of the assessment for real property, income, and business or other assessment; there is no tax upon personal property as such, but by sec. 2(h) (4) it is enacted that ‘in this Act’ real estate shall include, *inter alia*, ‘all structures, machinery and fixtures, erected or placed upon, in, over, under or affixed to, land.’ ”

This is the same provision as exists in the present Assessment Act.

The Legislature has seen fit specifically to define “land”, “real property” and “real estate” for the purposes of The Assessment Act, and in my opinion a transformer and transmitter clearly fall within the statutory definition as machinery placed upon land. Such machinery need not be affixed thereto.



Section 1(i)(iv) clearly contemplates not only fixtures and machinery which is affixed, but also machinery which is only placed upon, in, over, or under the land, and not necessarily affixed.

Section 4(17) of The Assessment Act provides for an exception to this general rule, excluding therefrom all fixed machinery used for manufacturing or farming purposes, but there is, in turn, an exception to the exemption, as set out in subs. 17. It would appear that the machinery in question in this assessment is machinery owned, operated and used by a person having the right, authority or permission to maintain and operate the same for the purpose of transmitting a service, namely, radio broadcasting, which would be included in the provisions of subs. 17.

In my opinion this appeal should be dismissed with costs.

AYLESWORTH J.A. (*dissenting*):—This is an appeal from that part of the judgment of the Ontario Municipal Board, dated 9th March 1949, fixing appellant's assessment for "machinery and equipment" at the sum of \$11,000.

The machinery and equipment consists of (a) broadcasting towers, (b) a system of ground wires, (c) a transformer and (d) a transmitter. At the opening of the appeal appellant stated that the appeal would not be pressed as to items (a) and (b), and accordingly argument proceeded only as to the assessability of items (c) and (d).

The appellant leased lands in the improvement district of Mountjoy for a period of ten years, and operates thereon a broadcasting station. A building of the cheapest type of construction was erected, within which are housed the transformer and the transmitter. These machines were "tailor made" for the particular type of broadcasting and power ratio involved in appellant's broadcasting operations. The machines were brought into the building after completion thereof, rest therein by their own weight only, and are connected to a hydro service line and to the ground system and towers by the ordinary type of electrical connection. The machines could be removed from the building at any time without damage to the realty.

It is not seriously contended that the transformer and transmitter are not, by their very nature, chattel property. It is said, however, that having been brought upon the land and

housed there, they have become "land" for assessment purposes within the meaning of the definition of "land" in The Assessment Act, R.S.O. 1937, c. 472, s. 1(i) (iv) which includes as land "all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land". Argument was also addressed to us to the effect that the inclusion of these machines as land under The Assessment Act is demonstrated and affirmed by the provisions of s. 4(17) of the Act. I shall deal first with the second of these arguments.

By s. 4 of the Act, all real property is made liable to taxation, subject to numerous exemptions then set out in various subsections. By subs. 17, all fixed machinery used for manufacturing or farming purposes is exempted. Admittedly the machines in question here are not used for such purposes, and in my view this fact shows conclusively that subs. 17 has no application. What follows in subs. 17 is a list of exceptions from the exemption. Since the exemption itself has no application, I fail to appreciate how any exceptions to the exemption, regardless of how such exceptions may be phrased, have any bearing whatsoever upon the matter in issue here, and I so expressed myself during the argument. Even if this be not so, an analysis of those of the exceptions alleged to be pertinent demonstrates that such exceptions are not applicable to the appellant. Paraphrasing the exception in part, the appellant is not a person owning, operating or using machinery with the right, authority or permission to construct, maintain or operate *in, under, above, on or through any highway, lane, or other public communication, public place or public water, any structure or other thing*, for the purpose of conducting any property, substance or product capable of transmission for the supply of power or other service. Appellant has not constructed and does not maintain or operate any structure or thing except upon private property leased by it.

Turning now to a consideration of the definition of "land" in The Assessment Act, it is essential, I think, to consider the underlying scheme of assessment which the statute contemplates. Formerly personal property as well as real property was assessable. For many years now personal property, as such, has not been subjected to municipal taxation under the Act. The emphasis has been placed upon the assessment of real property, and real property has been given an extended mean-

ing by special definition. That definition, however, cannot be taken to have so extended a meaning as to include as land all objects of personal property which are brought upon, in, over or under the land. A chair is a structure, and a sewing-machine may well be regarded as machinery, and yet to hold that under the definition in the Act such objects, merely because they are either structures or machinery, are assessable as land, is a proposition in its nature so startling as to require no answer.

In *Re City of Ottawa and Ottawa Electric Railway Co.* (1922), 52 O.L.R. 664, Rose J., in delivering the judgment of the Court, held that in assessment matters the test to be applied is whether the intention in bringing chattels upon land is to improve the land or, on the contrary, to put the machine in a place where it can conveniently be used as a machine.

It is true that in that case the Court had before it the interpretation of an agreement as to assessment between the parties and not the interpretation of the definition of "land" in The Assessment Act in its present form. The question of the scope and interpretation of the definition of land in the Act, however, came up squarely for decision some years later in *Re Ford Motor Co. of Canada Ltd. and Town of Ford City*, 63 O.L.R. 410, [1929] 2 D.L.R. 109, affirmed *sub nom. The Town of Ford City v. The Ford Motor Company of Canada, Limited*, [1929] S.C.R. 490, [1929] 4 D.L.R. 597, wherein Middleton J.A., reading the judgment of the Court, expressly adopts the same ratio for the determination of what is "land" within the meaning of the statutory definition thereof. After discussing the question, his judgment upon this aspect of the case concludes at p. 413, as follows: "This machine was installed for the purpose of its effective operation, and in no way for the benefit of the land as land, and so for the purposes of assessment it remained chattel property."

The evidence here abundantly establishes, in my view, that the intention was to install these machines where they were installed for their beneficial and convenient use as machines, and for no other purpose. The land was leased by the appellant for a comparatively short term of years only. The building from which the machines are operated is one of the cheapest type of construction. The machines themselves become obsolete in a matter of a few years only, in fact even before the expiration of the term of the lease. All of these and other factors as to



which evidence was led at length before the Ontario Municipal Board, and as to which there is no dispute, satisfy me that nothing whatsoever has been done to change the essential nature of this transformer and transmitter. They remain personalty, and as such are not assessable.

Unfortunately the Ontario Municipal Board saw fit to fix the assessment of the towers, system of ground wires, transformer and transmitter at a lump sum simply under the caption "machinery and equipment". Before an appeal was taken to the Board, the enumerated items had been assessed separately, but at such a very much larger sum in the aggregate, that it is impossible now, upon the assessment presently appealed from, to determine what sum the Board considered a fair assessment upon the broadcasting towers and upon the system of ground wires. The assessment of machinery and equipment as it stands is bad, and in the circumstances must be set aside in its entirety.

I would therefore allow the appeal and set aside that portion of the Board's order assessing machinery and equipment at the sum of \$11,000. The appellant is entitled to its costs of the appeal.

*Appeal dismissed with costs, AYLESWORTH J.A. dissenting.*

*Solicitors for the appellant: Zimmerman, Blackwell & Haywood, Toronto.*

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## [COURT OF APPEAL.]

## Fokuhl v. Raymond et al.

*Contracts—Interference by Unlawful Means with Contractual Rights of Another—Elements of Cause of Action—Distinction from Action for Conspiracy to Injure in Business.*

*Labour Law—Liability of Trade-union Officer Inducing or Attempting to Induce Breach of Contract between Employer and Employees or between Employer, as Subcontractor, and General Contractor—Calling Men off Work to Induce Termination of Contract by General Contractor.*

Where trade-union officers insist that union members shall leave their employment with a subcontractor (the men themselves being satisfied with that employment and with all its incidents), for the purpose of inducing the general contractor to terminate the subcontract, their conduct amounts to an unjustified use of unlawful means to interfere with the contractual rights of the subcontractor, and may be restrained by injunction, even before the general contractor takes any steps to terminate the subcontract. *Lumley v. Gye* (1853), 2 E. & B. 216; *Quinn v. Leathem*, [1901] A.C. 495 at 510, applied; other authorities reviewed.

Judgment of LeBel J., [1948] O.R. 367, affirmed.

AN APPEAL by the defendants from the judgment of LeBel J., [1948] O.R. 367, [1948] 3 D.L.R. 11. The facts are fully stated in the reasons for judgment of ROACH J.A.

20th and 21st April 1949. The appeal was heard by LAIDLAW, ROACH and AYLESWORTH JJ.A.

*H. Nethery, K.C.*, for the defendants, appellants: I do not concede that Raymond, at the meeting of 26th May, went farther than to urge the men not to return to work on the following day. Even, however, if he demanded or instructed them, he did nothing unlawful. No breach of the plaintiff's contracts with his employees resulted because 30 days' notice had already been given, and (1) no contract with any employee has been proved, and (2) if there were contracts, it must be assumed that they were on a weekly basis and a week's notice would be sufficient. [AYLESWORTH J.A.: But the employees had petitioned the Union to the contrary after the original notice, and had let Raymond know of their change of mind. Would this not revoke Raymond's authority?] No, because as a result of Raymond's influence the men did in fact refrain from working. They had not withdrawn the notice, and the petition was merely directed to the Union, asking it to change its attitude.

There is no basis for an injunction or other judgment against the defendant Hadley, who did nothing more than preside at the meeting of the Local. He did no inducing, etc. The defendant Papple merely carried out, in good faith, the requirements of the Union constitution.

The trial judge is wrong in saying that the action is not based on conspiracy. A paragraph of the statement of claim, by an amendment made at the trial, expressly bases it, at least in part, on conspiracy.

Raymond merely persuaded and acted for the members of the Union. What he did was not for the purpose of inducing a breach of contract, but simply to carry out the men's wishes and Union policy. There was no malice. In so far as the claim is based on conspiracy, the leading case is *Crofter Hand Woven Harris Tweed Company, Limited et al. v. Veitch et al.*, [1942] A.C. 435, [1942] 1 All E.R. 142. I have no quarrel with the trial judge's interpretation of that case, but he was wrong in holding that it was inapplicable here on the ground that the action was not founded on conspiracy. [LAIDLAW J.A.: Why need you deal with conspiracy? There is no finding against you on that issue.]

On the basis that the action is one simply for wrongful interference with contractual rights, I refer to *Newell v. Barker and Bruce*, [1949] O.R. 85, [1949] 1 D.L.R. 544. The trial judge here has not given effect to the principle of justification dealt with in that case. The limitation on the principle of justification suggested by the trial judge is not supported by the authorities. Even if the defendants induced a breach of contract, they are entitled to be excused because of their motives: *Quinn v. Leatham*, [1901] A.C. 495, per Lord Macnaghten. As to justification generally, I refer also to *Sorrell v. Smith et al.*, [1925] A.C. 700; *Thorne v. Motor Trade Association*, [1937] A.C. 797; *Ware and DeFreville, Limited v. Motor Trade Association et al.*, [1921] 3 K.B. 40.

Compelling men to stay away from work, when they had a right to do so, is not actionable: *Allen v. Flood et al.*, [1898] A.C. 1; *Hodges v. Webb*, [1920] 2 Ch. 70. The plaintiff has not established that it was a breach of contract for these men to stay away from work on 27th May, and his whole case therefore



fails. This was not a "strike" within Reg. 1(j) under The Labour Relations Board Act, 1947 (Ont.), c. 54. Further, even if there was a breach of contract by the plaintiff's employees, it was their breach and not Raymond's. Raymond had no power to compel them; they had to decide, even after his "order", whether or not they would go to work.

*N. L. Mathews, K.C. (Beatrice E. Lyons, with him)*, for the plaintiff, respondent: The English cases, and the earlier Ontario cases, have very little application in view of the Regulations under The Labour Relations Board Act, 1947. They are all based on the theory that a stoppage of work, at any time, is legal, but here, quite apart from their contracts, the men could not stop work by concerted action, although an individual might do so. I cannot point to any specific breach of a contract between the plaintiff and any one of his employees, except for the basic fact that the relationship of master and servant was terminated. I concede that any individual employee had a right to stay away from work on the morning of 27th May, without violating his contract. But they did not do this as individuals. They acted collectively, and that fact made their action illegal.

The stoppage of work, when done collectively, constitutes a breach of Reg. 21. It is clearly within the general meaning of the word "strike", apart from any special definition. As to this general meaning, I refer to *Williams Brothers (Hull), Lim. v. Naamlooze Vennootschapp W. H. Berghuys Kolenhandel* (1915), 86 L.J.K.B. 334; *Farrer v. Close* (1869), L.R. 4 Q.B. 602; *King et al. v. Parker* (1876), 34 L.T. 887; *J. Lycns & Sons v. Wilkins*, [1896] 1 Ch. 811 at 829. The definition of "strike" in Reg. 1 is not exhaustive, since it uses the word "includes": *Rex v. McMorran*, [1948] O.R. 384 at 388, 91 C.C.C. 19, [1948] 3 D.L.R. 237, 5 C.R. 338. All but two of the definitions in Reg. 1 use the word "means".

If the walkout on 27th May was a strike it was clearly illegal under the Regulations. If there was no collective agreement in effect, then it was illegal under Reg. 21(1), and if there was a collective agreement it was illegal under Reg. 21(3). If the strike was illegal, then any attempt to induce or counsel it was also illegal: Reg. 37(1).

The contracts between the plaintiff and his men, which were for an indefinite term, must be read as incorporating the law of Ontario as it then existed, and prohibiting concerted walking-out.

The collective agreement (ex. 4) was a valid and binding agreement, despite the absence of the approval of the international president. Neely and Reid were the bargaining representatives of the Local, and as such they negotiated this agreement with the plaintiff. They had authority to do so under the Regulations. [AYLESWORTH J.A.: But the agreement they negotiated was expressly made subject to approval.] The form of agreement had previously been approved by the international president, although this particular agreement was not so approved. In any case, the objection taken to the agreement at the meeting of the Local was not that it had not been approved by the international president, but that it had not been approved by the Local. Raymond is estopped from denying the validity of the agreement, because he had no authority to represent the men if there was a collective agreement in effect.

Nowhere in their pleadings have the defendants pleaded justification, and we are therefore not called upon to consider that aspect, but are left with the simple question of inducing a breach of contract.

I have dealt so far with a breach of the contracts of employment. There is, however, another aspect of the case, which is that Raymond clearly attempted to bring about a breach of our contract with the Austin company. That, if completed, would be an actionable wrong, and we are therefore entitled to an injunction to restrain the defendants: *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749; *South Wales Miners' Federation et al. v. Glamorgan Coal Company, Limited, et al.*, [1905] A.C. 239; *Temperton v. Russell et al.*, [1893] 1 Q.B. 715; *Klein v. Jenoves and Varley*, [1932] O.R. 504, [1932] 3 D.L.R. 571; *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600. If it is an actionable wrong to induce a breach of contract, or attempt to do so, then we are clearly entitled to an injunction to restrain a repetition of such attempts: *Leeds Industrial Co-operative Society, Limited v. Slack*, [1924] A.C. 851.

The other two defendants are clearly liable, equally with Raymond, on the principle that in an unincorporated association any members who acquiesce in or ratify a tort are liable: *Brown*

*v. Lewis* (1896), 12 T.L.R. 455; *Barrett v. Harris* (1921), 51 O.L.R. 484, 69 D.L.R. 503; *Harper v. Granville-Smith* (1891), 7 T.L.R. 284. The evidence clearly shows their participation.

*H. Nethery, K.C.*, in reply: Although the definition of "strike" in the Regulations uses the word "includes", it must surely be taken that the word when used in the Regulations has that meaning: see, *e.g.*, Reg. 21(5). The cases cited as to the meaning of the word "strike" will all be found to involve questions of the terms or nature of the employment, which did not arise here at all. The American cases are collected in 40 Words and Phrases, perm. ed., pp. 309-12, and I refer particularly to *Uden v. Schaefer et al.* (1920), 110 Wash. 391; *Jeffrey-De Witt Insulator Co. v. National Labor Relations Board* (1937), 91 F. 2d 134 at 138. This was not a "strike" within the meaning of the Regulations, and they consequently have nothing to do with the case.

There is nothing to estop Raymond from denying the validity of this alleged collective agreement. The plaintiff was not misled by anything Raymond said or did.

Although the Court has power to restrain a threatened wrong, there must be a real threat: Kerr on Injunctions, 6th ed. 1927, pp. 16, 411. There is no suggestion in the evidence that there was any likelihood of a cancellation of the Austin contract.

Comments on the action of union officials in notifying a general contractor will be found in both *Allen v. Flood et al.*, [1898] A.C. 1, and *Hodges v. Webb*, [1920] 2 Ch. 70.

*Cur adv. vult.*

27th June 1949. LAIDLAW J.A. [after stating the facts]:— I shall now refer to certain findings made by the learned trial judge. He found that the subcontract between the Austin company and the respondent was a perfectly valid agreement; that the respondent was a *bona fide* employer of labour, and that the workmen engaged upon the electrical installations in the Dow plant were his employees and not employees of the Austin company. He found that there was interference with the plaintiff's workmen by concerted action of the defendants, but pointed out that "it should be noted that the plaintiff does not plead, nor did his counsel argue, that the defendants have conspired to injure him in his trade or business". He proceeded to consider



and decide the issue as to whether the defendants wrongfully induced a breach of contract or contracts as alleged in the statement of claim, and concluded "upon all the evidence that the actions of the defendants in the present case amounted to wrongful interference". He expressed the opinion that "the defendants must be found to have intended by their actions to cause the termination of the plaintiff's sub-contract and to have acted accordingly". He said, "This, in my view, amounts to the wilful violation of the plaintiff's legal rights without justification, and is actionable". He directed that the interim injunction be made permanent, and I now quote the terms in which the judgment was issued:

"THIS COURT DOTH ORDER AND ADJUDGE that the defendants, their agents and servants be and they are hereby perpetually restrained from inducing, attempting to induce, conspiring to induce, or continuing to induce a breach of contract between the plaintiff and The Austin Company Limited, and from threatening to interfere in any way with the business and lawful pursuits of the said The Austin Company Limited in order to induce, or having the effect of inducing the said The Austin Company Limited to break or terminate its contract with the plaintiff, and from interfering with the employees of the plaintiff, or persons whom the plaintiff seeks to employ, or persons who seek to be employed by the plaintiff, and from requiring the said employees to cease working for the plaintiff or to continue refraining to work for the plaintiff by concerted action, and from threatening to fine, suspend or expel the said employees of the plaintiff from the International Brotherhood of Electrical Workers and/or Local Union B-530 by reason only of their employment with the plaintiff".

It is essential to obtain at once a clear understanding of the cause of action as it appears from the statement of claim and of the case presented by counsel on behalf of the respondent in the Court below and on appeal to this Court. The wrongful act of the appellants upon which the respondent founds his claim for relief is the interference without just cause or excuse with his contractual rights by the employment of unlawful means. There is no allegation that the appellants combined with one another or with any other person or persons for the purpose of injuring the respondent in his trade or business,

and there was no attempt at trial or in this Court to establish a case on that basis. The learned trial judge made that fact plain and proceeded, accordingly, to consider and decide the case as it was framed and presented before him. It might well be that the respondent might have put his claim for relief on the ground of conspiracy, but he chose to rely upon a different cause of action, as stated above, and I shall not endeavour now to make the evidence fit a case different from that conducted by counsel for the respondent in the Court below.

The principle relied upon by counsel for the respondent, and which he asks the Court to apply to the facts of this case, was the basis of decision in *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749. It was stated by Lord Macnaghten, with comprehensive brevity, in *Quinn v. Leathem*, [1901] A.C. 495 at 510, as follows:

“ . . . a violation of legal right committed knowingly is a cause of action, and . . . it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.”

That principle is referred to also in *National Phonograph Company, Limited v. Edison-Bell Consolidated Phonograph Company, Limited*, [1908] 1 Ch. 335 at 359, and in the reasons for judgment of Riddell J.A. in this Court in *Klein v. Jenoves and Varley*, [1932] O.R. 504, [1932] 3 D.L.R. 571.

The respondent says that the appellants wrongfully interfered with his contractual relations established under two separate contracts made by him, namely, (1) with Local B-530 and (2) with the Austin company. He does not argue in this Court (although he appears to have done so in the Court below) that there was evidence of violation of contractual relations between the respondent and each individual employee, or that he has a cause of action founded upon the fact that any one employee quit his employment or refused to work for him. He admitted in the course of argument in this Court, according to my notes, that “any individual employee would have the right to stay away from work on the morning of May 27th without violating a contract between him as an individual and the respondent”. Perhaps it might have been possible for him to adduce evidence to show that there was a breach of contract on the part of each employee who stayed away from work on 27th May, but there is no evidence on the record to support

such a finding. Counsel relies upon the contention that a contractual relationship existed between the respondent and the Local.

I think that the agreement reached between the respondent and Messrs. Neely and Reid, purporting to represent the Local, did not come into force and effect. There was no evidence that either Neely or Reid had any authority to enter into an agreement on behalf of the Local or to bind the organization or members of it to the terms and conditions set forth in the memorandum signed by them. Indeed, at the meeting of the members of the Local, immediately after that document was signed, objection was made to the lack of authority of Neely and Reid and they were retired from their respective offices in the Local because they signed the memorandum before first placing it before a meeting of the members for consideration and directions. Moreover, the memorandum contained an express stipulation that the agreement was "subject to the approval of the International President of the International Bro. of Elect. Workers". The meaning and effect of that clause must have been known to the respondent before he executed the memorandum, and in the absence of the necessary approval he cannot now contend successfully that the agreement came into force. His claim that there was interference by the appellants with the alleged contractual relations between the respondent and the Local must, accordingly, fail.

I agree with the finding of the learned trial judge that there was a valid and subsisting contract between the respondent and the Austin company. There is no ground whatsoever for the suggestion that the respondent was not a *bona fide* and independent contractor. The objections raised from time to time by the appellant Raymond to the status of the respondent were wholly unwarranted, and there was not the slightest reason or excuse for the appellant Raymond taking any exception whatsoever to the relations between the respondent and the Austin company. It is necessary to bring to mind the terms of the contract between those parties, and to examine particularly the respondent's rights and obligations thereunder. He had a right to payment by the Austin company of all costs of the work and of a fixed fee each and every week during the continuance of the term of the contract. He had a right to a continuation of the term and the enjoyment of the benefits



under the contract until cancellation of the agreement by him or by the Austin company in the manner therein provided, namely, by giving 30 days' written notice by one party to the other. He was bound by the terms of the contract to provide the labour and perform the specified work. In order to fulfil his obligations he was dependent upon the services of employees who were members of the Union. I quote his evidence as follows:

"Q. If the men were called off the job or went off the job and would not work for you, what would be the result, in the first place, as far as your contract with the Austin company is concerned? Would you be able to carry it out? A. No; I could not carry it out.

"Q. Would it be possible for you to hire non-union members in the event that the union members were called out on strike? A. No; I could not do it on a project of that kind."

It is apparent at once that if the employees who were union members refused to work for the respondent, he would be forced into a position where he would be unable to perform his contractual obligations. He would then lose his rights and benefits under his contract with the Austin company.

I proceed now to apply to the facts as stated the principle put forward and relied upon by counsel for the respondent. The pertinent question is: Did the conduct of the appellants amount to unlawful interference with the contractual relations between the respondent and the Austin company? It is essential to direct special attention to certain facts of much importance and to bear them in mind.

In the first place, on 27th May, when the respondent's employees refused to go to work, there was no dispute or difference or apprehended dispute or difference relating to the terms or conditions of employment or the labour relations as between the respondent and his employees. At the meeting on the night of 26th May, the employees of the respondent were "very close to 100 per cent. not in favour of a walkout". One witness testified that as far as he could see "they were all kind of a happy family around there".

The next fact to be observed, and which is clearly established in evidence, is that notwithstanding the absence of any such dispute or difference, and the desire and willingness of the em-

ployees to continue in the employ of the respondent, the reason they did not go to work on the morning of 27th May was because the appellant Raymond told them in unmistakable language that they must not do so. He said, as stated above, "You are not going to work"; "that the A-1 could not go back to work"; "that they were definitely walking out, and that was that".

There is no doubt whatever in my mind that the appellant Raymond used his position and influence as an officer of the Union to compel the respondent's employees to quit their employment. While it does not appear in evidence that any threat was actually made by Raymond to use his position or powers of office to penalize members of the Local who disobeyed him, nevertheless the fear of the consequences of such disobedience was undoubtedly in the mind of every employee of the respondent. Each and every one of them stayed away from his employment because in reality he was ordered to do so by the appellant Raymond, and there was no freedom of decision allowed by the appellant Raymond to any of them. If each employee had been permitted, without fear of consequences, and free from the influence of the appellant Raymond, to decide for himself whether he would go to work on the morning of 27th May and continue in the employ of the respondent, I have not the slightest doubt that he would have chosen to do so. That conclusion is confirmed by the fact that after an interim injunction was granted to the respondent some of his employees promptly returned to work for him, and after the officers of the Local permitted its members to do so, as previously mentioned, all or nearly all of his former employees resumed their employment.

What the appellant Raymond required and demanded each employee to do, against his will, was to join with the other employees and act in combination with them in quitting their employment. The sole purpose of that combination was to compel the respondent to give up and terminate his contractual relations with the Austin company and thus to injure him. A combination for that purpose, if it caused injury to the respondent, would be plainly unlawful and actionable. It would be a conspiracy, and each and every party to it would be responsible in law for damages caused by his wrongdoing. Although the respondent did not base his action or seek relief on that ground, nevertheless he is entitled to treat their conduct as unlawful

means employed for the purpose of putting an end to his contract with the Austin company.

This case differs somewhat from *Lumley v. Gye*, *supra*, and the class of cases following it, where a person procures a wrongful act of another and it is sought to make him legally responsible for its consequences. Following the decision in that case, the appellant Raymond would be liable to the Austin company if he knowingly and for his own purpose had induced the respondent to break his contract with the Austin company. Likewise, he would be liable to the respondent if he had induced the Austin company to break the contract. He would also be liable to the injured party if he procured his object by the use of illegal means. The gist of the cause of action is the doing of an unlawful act or the employment of unlawful means for the purpose of causing injury and the cause of action is given by law to the injured party. Thus, intimidation, coercion, obstruction and conspiracy are prohibited and wrongful acts *per se*. They may also be unlawful means to accomplish a wrongful purpose. In *Mogul Steamship Company, Limited v. McGregor, Gow & Co. et al.* (1889), 23 Q.B.D. 598, affirmed [1892] A.C. 25, Bowen L.J., at p. 614, makes it plain that every act causing obstruction to another in the exercise of individual rights, contractual or other, without just cause for it, and done not in the exercise of the actor's own right but for the purpose of obstruction, if damage should be caused thereby to the party obstructed, is prohibited in law.

When the act done is not only for the purpose of obstruction but for the purpose of putting an end to the exercise by the respondent of his rights, it becomes abundantly plain that the conduct of the appellant Raymond was illegal and the respondent can maintain an action against him for his wrongdoing. In *Quinn v. Leathem*, *supra*, Lord Lindley at p. 535 says that the principle which underlies the decision in *Lumley v. Gye*, *supra*, reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him.

Up to this point I have dealt with the case as against the appellant Raymond only. I shall now discuss the responsibility of the appellants Hadley and Papple. Hadley succeeded Neely as president of the Local in March 1947. He was present at the meeting held on 26th May when the appellant Raymond,



as I find, ordered the employees of the respondent to cease work on the following morning. He was not an employee of the respondent but he made no objection whatsoever to the illegal course of action demanded by Raymond. It must be found that as president of the Local he acquiesced and assented to it and that he became a party to the unlawful combination. I do not rest that conclusion on the evidence as to the conduct of Hadley in June 1947, after the issue of the writ, when the names of the employees who had then returned to work for the respondent were read out by the appellant Papple to a meeting of the members of the Local, and questions were raised as to their voting rights in the circumstances and as to their being put "on charge". He was chairman of that meeting, and it does not appear that he took any exception to the proceedings in respect of those employees. His conduct was consistent with the view and finding that prior to the issue of the writ he was a willing participant in all that was done to interfere with and put an end to the contractual relations between the respondent and the Austin company. The appellant Papple became business manager of the Local at the end of March 1947, and succeeded Reid in office. He was present at the meeting on 26th May and, in like manner to president Hadley, acquiesced and assented to what was then done to require the employees to cease work. It must be found that he also was a party to the use of unlawful means to interfere with the respondent's contractual rights. Again his subsequent conduct is consistent with that finding.

It is my opinion that the appellants Hadley and Papple are equally responsible in law with the appellant Raymond on the ground that they were all parties to the use of unlawful means to interfere with the contractual relations between the respondent and the Austin company. Accordingly, the respondent is entitled to an injunction against all the appellants to restrain them from wrongdoing. The terms and language used in the formal judgment of the Court below (quoted above) are not, in my opinion, appropriate and should be amended so as to restrain the appellants and each of them from interfering in any manner or by any means whatsoever with the contractual relations between the respondent and the Austin company and with the employment of workmen by the respondent for the purpose of performance of the contract between him and the Austin company.

Before parting from this case, I desire to make certain observations of a general character touching the matters in controversy and which give additional support to my opinion. I direct attention at once to the fact that the appellant Raymond, acting as international vice-president of the union, presumed to assert a right to decide conclusively that the respondent did not possess proper qualifications or standing in his trade to make a contract with the Austin company, and for that reason to forbid the parties to continue their contractual relations. It is simply inconceivable to me that any officer or officers of a trade union, or any other person or persons, without lawful authority, should attempt to exercise such a right. Every person is entitled to enter into whatever lawful contracts he may choose to make, with any other person or persons who are willing to make an agreement with him, providing such person or persons are not disqualified by law. The free and full exercise of that right is not subject to the dictation or control of any other unauthorized person or persons in any manner or to any extent whatsoever, and any attempt to interfere wrongfully with it ought to be suppressed.

It is to be observed next that the appellant Raymond invaded the harmonious trade relations existing between the respondent and his employees. As I previously stated, there was no existing or apprehended dispute between the respondent and his employees, and under those circumstances there was not the slightest excuse for intervention by any officer of the Union or Local or the disruption of trade relations. Such conduct on the part of an officer of a union is plainly in excess of his authority and cannot be justified or excused. On the contrary, it should be condemned in the strongest terms.

Another matter of comment and surprise to me is that the appellant Raymond, with a high-handed, dictatorial assumption of power, undertook to force his will and demands as an officer of the Union upon employees who were opposed to him in their views. In fact, he ordered them to cease employment when they did not wish to do so, and when there was no reason whatever for them to do so. It was an affront to their rights which ought to have been repelled by them with such force and vigour as to make it certain once and for all time that they were not slaves and that their right to choose for themselves whether

they would continue in the service of an employer with whom they had no dispute or difference belonged to them and to them alone.

Trade unions and their officers, and members thereof, possess and may exercise certain rights for the protection of employees, but it ought to be apparent to them that they cannot exceed those rights or exercise them in an illegal manner in violation of the rights of others. If they attempt to do so, they must accept responsibility for their wrongful conduct.

I would direct that the terms and language of the formal judgment as issued in the Court below be amended in the manner previously proposed, and subject to that direction the appeal should be dismissed with costs.

ROACH J.A.:—This is an appeal from the judgment pronounced by the Honourable Mr. Justice LeBel by which the defendants, their agents and servants are perpetually restrained (a) “from inducing, attempting to induce, conspiring to induce or continuing to induce a breach of contract between the plaintiff and The Austin Company Limited and from threatening to interfere in any way with the business and lawful pursuits of the said The Austin Company Limited in order to induce, or having the effect of inducing the said The Austin Company Limited to break or terminate its contract with the plaintiff”; (b) “from interfering with the employees of the plaintiff, or persons whom the plaintiff seeks to employ, or persons who seek to be employed by the plaintiff, and from requiring the said employees to cease working for the plaintiff or to continue refraining to work for the plaintiff by concerted action, and from threatening to fine, suspend or expel the said employees of the plaintiff from the International Brotherhood of Electrical Workers and/or Local Union B-530 by reason only of their employment with the plaintiff”.

This is an important case and I deem it necessary to set out with more than usual particularity the facts out of which the litigation developed.

The Austin Company Limited as general contractor had a contract with Dow Chemical Company of Canada Limited to construct a very large manufacturing plant in or near the city of Sarnia. The contract included the installation of electrical equipment including electric lighting, electric power lines and



other such equipment. In the early part of 1947 the work was in progress and electricians who were members of the International Brotherhood of Electrical Workers, Local Union no. B-530 were employed on the job. One Reid was at that time business manager of the Local and one Neely was its president. It was apparently contrary to the general policy of the International Brotherhood of Electrical Workers to countenance members of any of its locals working for a general contractor and in February 1947 the defendant Raymond, as the international vice-president of the Union, drew this fact to the attention of the officers of the Local. As a result Reid, on behalf of the Local Union, wrote a letter to the Austin company. That letter was not filed as an exhibit at the trial but Reid in his evidence stated that the substance of it was "that after 30 days we would withdraw our men unless a recognized electrical contractor was put on the job". That letter was sent by Reid without being first authorized by the members of the Local. However, there was a meeting of the members of the Local held shortly thereafter and with respect to that letter Reid stated in evidence that: "We thoroughly discussed it on the floor of the meeting, and the boys were informed of the letters I received from the international office and the letter I sent and the action was sanctioned and approved by them".

I interrupt this narrative to record certain facts as they appear in the evidence concerning the plaintiff Fokuhl. He is an electrical engineer, a graduate of a university in Germany with the degree of Bachelor of Science. It does not appear when he came to Canada but in any event for many years prior to the outbreak of war in 1939 he practised his profession in Canada and his work included consultations, supervision and electrical contracting. After the outbreak of the war he gave up his business and enlisted in the Canadian army. In 1942, in view of his qualifications, a department of technical personnel in the Canadian Government caused him to be sent to the Polymer Corporation at Sarnia which was then engaged on war work, and while there he was kept on the Reserve Army list. The particular work at the Polymer plant on which his services had been required having been completed, he returned to military service. He was discharged from the army in May 1945 and returned to Orillia, Ontario, which had been his home for many

years, and there went into business for himself under the firm name and style of A-1 Electric. He opened an electrical supplies store and in addition carried on business as an electrical contractor. In February 1946, as the result of a communication from Dow Chemical Company, he went to Sarnia and was employed by the Austin company in the capacity of a superintendent on the construction of the Dow Chemical Company plant. In due course he disposed of his business in Orillia and moved to Sarnia or its environs. He was resident there and employed in the foregoing capacity when Reid wrote the letter to the Austin company to which I have referred. It should be added that Fokuhl became a member of Local B-530 when he was employed by the Polymer Corporation and when he returned to Sarnia in the employ of the Austin company he renewed his membership in the Union and paid his membership dues up to and including at least March of 1947. His Union membership card was filed as an exhibit at the trial. It is not without significance that his trade classification shown by the Union was "Superintendent & Contractor".

As a result, without doubt, of the threat contained in Reid's letter to withdraw union electricians from the job "unless a recognized electrical contractor was put on the job", the Austin company entered into a written contract with the plaintiff under date 24th March 1947. Under the terms of that contract the plaintiff was required "to provide the labour and perform the work required in connection with the installation of electrical equipment, electric lighting, electrical power lines and such other work of a nature normally installed by workmen of the electrical trades" on the Dow Chemical job. The Austin company was to furnish all materials, equipment, tools and storage facilities. The contract further provided that the rates of pay to be paid by the plaintiff to his employees on the job were to be those established by the International Brotherhood of Electrical Workers Local B-530. The plaintiff was to pay all payrolls as they became due and to pay any other expenses or costs in connection with the work which might be required by the Austin company. There was no specific contract price mentioned in the contract, but the Austin company was to pay all approved costs of the work and pay the plaintiff a fixed fee of \$50 per week. This was later increased to \$75 per week.

It would appear that the plaintiff and the Austin company were negotiating that contract prior to 24th March and it is a reasonable inference that all the terms thereof had been agreed upon prior to 22nd March. On 22nd March the plaintiff met Reid and Neely at Sarnia and a collective bargaining agreement between the plaintiff as employer and Local B-530 was signed by the plaintiff and by Reid as business manager of the Local and Neely as its president. That document was produced by Neely to the plaintiff already typed, with only the blank spaces to be filled in. The only blank spaces were those left for the name of the employer, the date of the agreement, and the dates between which it was to be effective. The name of the plaintiff as employer and the dates were written in ink on the document and then the parties signed it. It is a most comprehensive document setting forth the employer's rights, the Union's rights, the working conditions including the hours of work and rates of pay, and numerous other provisions. One of its terms requires the employer to employ only members in good standing of the Union save only where the Union is unable to furnish the employer with workmen within 48 hours from the time when the Union is requested so to do and in that event the Union may issue temporary cards to non-union workmen if they are acceptable to the Union.

At the end of the document, and about opposite the space left for the signature of the parties, are the typewritten words: "Subject to the approval of the International President of the International Bro. of Elect. Workers". The agreement, after it was signed, was not approved by the international president.

During the discussion between the plaintiff and Reid and Neely on 24th March, and before the agreement was signed, the plaintiff explained to Reid and Neely that he had a contract or was about to obtain a contract with the Austin company covering the electrical work on the Dow Chemical job. It was because of that very fact that he wanted a collective bargaining agreement with the Union.

Now a word as to the defendant Raymond and his position. He was the international vice-president of the International Brotherhood of Electrical Workers. His territorial jurisdiction covered the whole of Canada and Newfoundland. His headquarters were in the city of Windsor. His first interference at



the Dow Chemical job was in February 1947, when he wrote to Reid concerning union electricians working for the Austin company. It was as a result of his letter to Reid that Reid wrote the Austin company the letter to which I earlier referred giving that company thirty days within which to get a recognized electrical contractor on the job. Reid reported back to Raymond that he had written that letter. Before the thirty-day period had expired one Filkins, an official, or at least a representative, of the Austin company applied not to Reid but to Raymond for an extension of time. Filkins went to Windsor specifically for that purpose. Speaking of that interview Raymond stated in evidence: "I immediately got on the telephone and called the business manager in Sarnia and told him of the conversation, and the extension was granted." It was granted without the members of the Local being in any way consulted.

On 22nd March Raymond was in Montreal. The plaintiff's solicitor in Sarnia sought him out there and in a long-distance telephone conversation told him that he had an electrical contractor in his office who was anxious to sign a contract, meaning a collective bargaining agreement, with the Union. The evidence leaves it in doubt whether or not the solicitor told Raymond the name of the contractor. Raymond explained to the solicitor that he did not sign such contracts and referred him to the business manager of the Local. It was later that same day that the plaintiff and Reid and Neely signed the agreement in Sarnia.

On 23rd March Raymond in Montreal received a telegram from some one or more persons connected with the Local in Sarnia. The identity of the person or persons who sent that telegram is not disclosed. As a result of it, Raymond at once got in touch with Reid and instructed him to call a special meeting of the Local for 27th March. Reid followed those instructions.

On 27th March Raymond arrived in Sarnia and sent for the plaintiff. That was the first occasion upon which they met. As of that date the plaintiff had about 20 employees on his payroll on the Dow Chemical job, all of whom were members of the Union. When the plaintiff met Raymond on that date Raymond had with him Reid and one Armstrong, who was an organizer for the International Brotherhood of Electrical Workers. Raymond told the plaintiff that Reid and Neely had

no authority to sign the agreement without its first being approved by the members of the Local. The plaintiff in his evidence stated that he was surprised at that statement because he had understood that it had been previously approved by the members as to form and content. I think it is quite clear from the evidence that the plaintiff's understanding was entirely correct; it had been approved by the members as to form and content. In fact, the agreement seems to have been the handiwork of the members of the Local, who had fashioned it from a form of collective bargaining agreement obtained by them from the office of the International Brotherhood of Electrical Workers in Windsor. Taking that form as their guide, they made changes and additions such as they thought proper and in their interest. It is highly important to observe that throughout the whole history of events leading up to the commencement of this action and down to and including the trial, no one connected with the Union, including these defendants, had any objections to that document, either as to its form or as to its contents, except that the plaintiff was a party to it.

Raymond told the plaintiff that a meeting of the Local was being held that night and asked the plaintiff to meet him after the meeting, when he would have further information for him.

The meeting was held and, of course, Raymond, Reid and Neely were present. In the words of Raymond, "It was a pretty hot meeting." Three matters came up for discussion. First some members claimed that the plaintiff was not a contractor or, to put it in the words of Raymond, "They felt that owing to the move made on the part of the Local Union" (that is a reference to the ultimatum which Reid had given the Austin company in his letter to it) "Mr. Fokuhl was just acting as a 'stooge' for the Austin company." Second, that Reid and Neely had exceeded their jurisdiction in signing the agreement without it being first sanctioned by the members. This objection, of course, was directed only to the fact that it was an agreement with the plaintiff. Third, some members insisted that Reid and Neely should resign their offices because of what they had done.

Following the meeting Raymond met the plaintiff that same night. I now quote from Raymond's evidence:

"Q. What took place at that meeting? A. I believe I brought the executive board of the Union, or the officers, up

to the room and told Mr. Fokuhl the members had absolutely refused to have anything to do with him as an electrical contractor; that the parties who had signed the agreement were not authorized to sign the agreement, and I had no other alternative but to go on record as saying we could not acknowledge him.

“Q. What did Mr. Fokuhl say? A. I do not like to use the exact words he said. He was, shall I say, begging us to try to get us to change our minds. I said I had to follow the instructions of the Local Union, and that was my position.”

Raymond then left Sarnia. His next visit to Sarnia was on or about 23rd April. He again saw Fokuhl and reiterated in substance what he had told Fokuhl after the meeting of the Local on the night of 27th March. What had happened in the interval is important. The plaintiff's employees did not discontinue their employment with him but remained on the job. The plaintiff continued to live up to the terms of the collective bargaining agreement. He had about 20 employees on his payroll. There may have been a few of them who were grumbling a bit but as a group they would appear to have been entirely satisfied. It is a reasonable conclusion, having regard to the evidence, that there was a feeling of apprehension not only on the part of the plaintiff but on the part of his employees. Under date 18th April, 17 of the employees signed a statement, referred to throughout the evidence as a petition, to the International Brotherhood of Electrical Workers reading as follows:

“We the undersigned employed by A-1 Electric since March 24th, 1947, found the working conditions as to hours, rate of pay, satisfactory. We have no objections working under the A-1 Electric. The present set-up of working independent from a General Contracting Firm has our approval.”

That statement was sent direct to the head office of the Union in Washington.

The plaintiff's apprehension could not have arisen by reason of any indication of dissatisfaction among his employees, because, if the petition indicated their attitude, there was no dissatisfaction. I am not in any doubt that the plaintiff's apprehension arose because of Raymond and others, perhaps unknown to the plaintiff, who occupied positions of power in the Union. Anxious for industrial peace and to proceed under his contract



with the Austin company, the plaintiff wrote Raymond giving him a wealth of information concerning his business and a résumé of his professional and business activities back to 1926, a mere sketch of which I have given earlier in these reasons. All that, however, did not satisfy Raymond. Meanwhile Raymond was in communication with the international headquarters of the Union. I again quote from his evidence:

“Q. You had communicated with the international office with respect to this matter? A. Yes.

“Q. And did you know what their attitude was? A. Yes, an open mind.”

The officials at international headquarters having “an open mind”, and the men on the job being perfectly satisfied to the extent that the petition indicates, it is interesting to note what Raymond’s attitude and purpose was. Again I quote from his evidence:

“Q. I was wondering why you waited from the 27th March, when you learned about this matter to the 26th April to send such a wire to the Austin company? [I will refer to that telegram in due course]. A. I had thought that the matter might be settled.

“Q. I think you refer in another place in your evidence to the fact that you tried to get this matter settled. Tell His Lordship just what settlement you had in mind. What did you suggest, if anything, by way of settlement? A. I suggested to Mr. Fokuhl that he show us that he was going to be a *bona fide* contractor by letting the Austin company contract go; also to send the agreement [that is, the collective bargaining agreement] in to the international office. If he had done so there is a strong probability that the international office would have advised the Local Union to contract with Mr. Fokuhl. . . .

“Q. But the only settlement you suggested to Mr. Fokuhl was that he forego the contract with the Austin company? A. I could not do anything else.

“Q. And is it a fact, as Mr. Fokuhl said, and probably arising out of that proposed settlement, that if Mr. Fokuhl would forego his contract with the Austin company the Local would be prepared to enter into a new agreement with him? A. That is right. . . .

“Q. If you were prepared to arrange a settlement with Mr. Fokuhl, you have told us that his part of the settlement would be to forego the contract with the Austin company? A. Yes.”

It is history now that such a “settlement” was not made and because it was not made Raymond pursued his purpose. Under date 26th April he sent a telegram to Mr. Filkins of the Austin company reading as follows:

“Unless established Union Electrical Contractor having Contractual relations with Local Union B-530 of the International Brotherhood of Electrical Workers Sarnia, is on the Dow project within thirty days members shall refrain from work. A-1 Electric not an established Electrical Union Contractor and has no authentic contractual relations with the above mentioned Union. Your immediate co-operation will be appreciated.

[signed] John Raymond

International Vice-President.”

He was considerate enough to send a copy of that telegram to the plaintiff with a letter reading as follows:

“Dear sir and brother:

“Please find enclosed copy of a wire I am today forwarding to Mr. L. Filkins of the Austin Co., Detroit, Mich.

“With best wishes I am

Fraternally yours,

[signed] John Raymond

International Vice-President.”

That telegram was sent from Windsor and I have been unable to find anywhere in the evidence that it had been previously authorized by the membership of Local B-530.

The plaintiff at once consulted his solicitors who wrote a letter to Raymond under date 28th April, as a result of which a meeting took place between Raymond and the plaintiff and the plaintiff’s solicitors, but that meeting accomplished nothing.

On 14th May the plaintiff wrote to the international president of the Union in Washington. That letter was not produced at the trial but it is described by the international president’s reply as being an “appeal from a decision of Vice-President John Raymond, as it affects you, as a member, and the A-1 Electric Company, which is owned by you”. I shall refer later to that reply. Meanwhile, I want to record events in their chronological order.

The petition signed by the plaintiff's employees under date 17th April was in due course received at the international headquarters of the Union and was sent from headquarters to Raymond about the middle of May.

I again quote from Raymond's evidence:

"Q. Immediately on receipt thereof you did not do anything about it? A. No.

"Q. Why? A. In the first place, if it was signed by our members it was to be ignored because it was not on our stationery and did not bear the seal of our Local Union."

I pause to observe that I can see no reason why the opinion of the men as expressed in that so-called petition should be ignored or their wishes, which were to be plainly gathered therefrom, not respected. To ignore the petition and to act entirely contrary to the expressed desires of the men could only mean that in the opinion of Raymond the Union was the master of the men and not their servant.

Raymond's answer to the next question is both confusing and enlightening. I quote the question and his answer:

"Q. Why would you not act on a document purporting to be signed by individual members? A. How was I to know that this was not a subterfuge to try to get me to step in and take action over the men's heads?"

It is confusing because of his reference to the possibility of it being "a subterfuge". I have not the vaguest notion what thought, if any, he was thereby trying to express. It is enlightening because it discloses that he felt that having regard to the position which he held in the hierarchy of the Union, it was possible for him to "step in and take action over the men's heads". In that answer he proclaims that while it would have been possible so to do, of course he would not do any such thing. Let us now see what he did:

On 26th May he came to Sarnia, as he said, "to see just what the picture was". That was the last day for the plaintiff's replacement by the Austin company. A meeting of some of the members of the Union was held on the evening of that day. According to Raymond it was "not a regular meeting"; it was a "get-together"; "it was not a meeting for the books". As to what happened at that meeting, I now quote from the reasons for judgment of the trial judge, and, of course, I adopt the



findings of fact reached by him on the conflicting evidence. He says:

"It appears to have been a rather stormy session, but Mr. Raymond insisted that he had done no more than express his annoyance over the petition and had told the members that they must make a final decision as to whether they would or would not work for the plaintiff. He denied threatening them in any way. The defendant Papple testified that Raymond had said that the members of the Local had made a decision, that a principle was involved, and that he thought they should abide by the decision they had made. One of the plaintiff's employees, Albert McLaughlin, called by the plaintiff, swore that Mr. Raymond had said that the men must walk out and that there was no use in disputing the fact. He also testified that 'very close to one hundred percent were in favour of no walk-out'. He was corroborated substantially by another of the plaintiff's employees, Lorne Lucas, and a third employee, John Watt, swore in effect that Mr. Raymond had said 'You are not going to work to-morrow.' The defence witnesses, with the exception of Mr. Raymond himself, were evasive in their evidence on the question of 'the calling out', and, I have no doubt, considering all the circumstances, that Mr. Raymond did express himself forcibly in favour of the members abiding by their former decision, regardless of the feelings of the members who had signed the petition and that he did call the plaintiff's men out, or did, as he said was the intention in one of his press interviews, 'withdraw [the] Union members from the job.'"

The defendants Hadley and Papple were at that meeting. By this time Reid and Neely were out of office and Hadley and Papple were filling the offices which they formerly held. Referring to those defendants the learned trial judge says, and I agree with him:

"I have also concluded that the defendants, Hadley and Papple, as well as some other members of the Local, supported the call to walk out and by their conduct generally influenced the men against returning to work on the morning of 27th May."

The men did not return to work on the morning of 27th May. The plaintiff issued the writ in this action that very day, and in due course obtained the injunction, and almost im-

mediately thereafter 12 of the plaintiff's men returned to work for him on this job.

It is relevant to refer to the fate of the plaintiff's appeal to the international headquarters of the Union at Washington. That appeal was received at headquarters on 15th May. The plaintiff did not receive a reply until a day or so after 9th June. Under that date the international president of the Union wrote him acknowledging receipt of his appeal, and saying: "Your communication had been given consideration; an investigation had been made; and an answer was being prepared for submission to you; when we were advised that you had filed suit in Court. . . ." The letter then went on to point out to the plaintiff that by commencing this action before first exhausting all his remedies through all the courts within the I.B.E.W. he had violated his obligation as a member of the Union and thereby suffered automatic expulsion by virtue of art. XXVII, s. 1 of the Constitution.

The relevance of that reply consists in this: that investigation by headquarters would include communications with Raymond at least; he would thereby know that the plaintiff was appealing to headquarters, but notwithstanding that knowledge he unrelentingly pursued his purpose. Ordinary decency and fair play should have prompted him to give the plaintiff a chance to have his appeal considered and disposed of. Even a favourable verdict on his appeal would have availed the plaintiff nothing if, pending that appeal, the real and steadfast purpose of Raymond and those combining with him had been accomplished.

That the return of the men to work displeased the defendants Papple and Hadley, and no doubt some of the other members of the Local, there can be no doubt.

A meeting of the Local was held on 17th June, and the 12 men who had returned to work, and who were at this meeting, were there called to account. Papple told them that they were "on charge", or would be placed "on charge", simply because they had gone back to work for the plaintiff without the consent of the Union, and that they had no vote at the meeting. The 12 men walked out of the meeting in disgust without even trying to vote.

On 23rd June the plaintiff made a motion by special leave before Mr. Justice Barlow and sought a committal order against

the defendants for breach of the terms of the injunction. Before the motion was heard the defendants Hadley and Papple very wisely undertook to permit the plaintiff's employees to work for him free from all threats of fine, suspension or expulsion from the Union. That undertaking having been given, the plaintiff abandoned his motion. Thereafter more of the plaintiff's employees returned to work.

In his statement of claim, the plaintiff pleads his contract with the Austin company, and alleges that he had entered into a collective bargaining agreement with Local B-530. The statement of claim then proceeds as follows:

"5. The plaintiff alleges that the defendants personally, and through their servants, agents and assistants have wrongfully interfered with the employees of the plaintiff in the performance of the said contracts by inducing the said employees by concerted action, or by threatening to fine, suspend or expel the said employees from the said International Brotherhood of Electrical Workers and/or Local Union B-530, to cease working for, and to continue refraining from, working for the plaintiff.

"5A. The plaintiff states that the defendants, personally and through their servants, agents and assistants, have attempted to induce, and conspired to induce, a breach of the said contract between the plaintiff and The Austin Company Limited, and in particular that the defendant John Raymond did demand of The Austin Company Limited that it break its said contract with the plaintiff and, in substitution therefor, enter into a contract with an electrical contractor other than the plaintiff."

In para. 6 the plaintiff alleges that as a result of the wrongful acts of the defendants, as previously set out, he has suffered damages because of his inability to proceed with his contract with the Austin company, and that he "will suffer irreparable damage unless the defendants are permanently restrained from interfering with the present and future employees of the plaintiff, and from inducing or attempting to induce a breach of the contracts entered into by the plaintiff."

In his prayer for relief he claims, *inter alia*, (a) an injunction in terms somewhat wider than were granted by the learned trial judge, and (b) damages.

The learned trial judge did not award the plaintiff any damages. He said: "If any damage has been caused by the few



weeks' idleness of the men it would seem that they themselves, and perhaps the Austin company, have been the ones to suffer."

The issue whether or not the plaintiff was entitled to damages, as well as the injunction order, is not before this Court, the plaintiff not having entered a cross-appeal.

During the hearing of this appeal there were two questions to which considerable argument was addressed, and as to which it is advantageous that I now say all that, in my opinion, is necessary to be said concerning both of them.

The first was the contention by counsel for the respondent that the document signed by Fokuhl and Reid and Neely under date 22nd March constituted a valid and binding collective bargaining agreement between Fokuhl as employer and the Union as the collective bargaining agent of his employees. In my opinion that contention must fail. The document on its face states that it is "Subject to the approval of the International President of the International Bro. of Elect. Workers". Art. I, s. 3 of the document deals with possible future amendments and requires that any such shall be reduced to writing and signed by the parties "and approved by the International office of the Union the same as this agreement". I would assume that approval by the international president would constitute approval by the international office. Whether it would or not makes no immediate difference. The document was not approved by him, and because it was not it never became a completed agreement, and therefore never operated.

It does not follow that, because it never became operative, it should be dismissed from consideration. In my opinion although, for the reasons I have stated, it never acquired the status of an agreement, it is nevertheless a most valuable and cogent piece of evidence. As I have previously pointed out, it was the handiwork of the Local Union, fashioned by its members or those delegated to that task as to both its form and content. It covered all the various incidents of the employer-employee relationship in a manner entirely satisfactory to the Union, the hours of work, the rates of pay, apprentices, qualifications, strikes, lock-outs, safety measures, union security, and many other similar incidents. The one and only objection which Raymond and others who objected to it had, was that the plaintiff was a party to it. That fact, to my mind, becomes particularly important when we come to consider the object and

purpose of the defendants, in all their acts and conduct, down to and including not only the walkout of the men on 27th May, but also the conduct and attitude of the defendants Hadley and Papple towards the men subsequent to the walkout.

The second question was whether each of the men who refrained from going to work on 27th May breached his contract of employment with the plaintiff. For the appellants it was argued that there was no evidence as to the terms of their employment and for all we know each of them might have been entitled to quit without notice at any time that he might choose; that since the contrary was not shown, it could not be held that any of them breached their contract with the plaintiff.

With the argument thus stated, I am in entire agreement. That, however, is far from the end of the matter, and, as I will later show, it is immaterial whether the men in refraining from returning to work did or did not breach their contracts with the plaintiff.

At this point it is also important to observe that the plaintiff does not put his case upon the footing that the defendants conspired to injure him in his trade or business. As the learned trial judge points out in his reasons, that is quite a different tort from the one which the plaintiff here alleges, and the legal considerations which apply to the one differ from those which apply to the other.

As I construe paras. 5 and 5A of the statement of claim, the combined effect thereof is that the plaintiff alleges that the defendants committed two torts, as follows: First, that they personally and through their servants, agents and assistants attempted to induce and conspired to induce a breach by the Austin company of its contract with the plaintiff. Second, that they personally and through their servants, agents and assistants wrongfully interfered with the employees of the plaintiff by inducing them to breach the contract, that is, the alleged collective bargaining agreement made on their behalf by Local B-530.

In my opinion the evidence irresistibly leads to two main conclusions of fact: First, that the defendant Raymond alone, and also in combination with his co-defendants, attempted up to the date of the issue of the writ, and even thereafter was continuing to attempt, to induce or procure a breach by the

Austin company of its contract with the plaintiff. Second, that the defendants coerced the employees of the plaintiff to quit and to refrain from returning to their employment with him, in order to prevent him, if possible, from carrying out his contract with the Austin company.

The arguments advanced in this Court by counsel for the appellants were several. He attacked the findings of fact of the learned trial judge. He argued that Raymond was simply carrying out the request and wishes of the members of the Local; that what he did, or what the other defendants did, was not done to induce a breach of the contract between the plaintiff and the Austin company, but solely for the purpose of carrying out the employees' wishes and Union policy, and that none of the defendants was actuated by malice.

It is beyond controversy that the contract between the plaintiff and the Austin company was valid, and that from the date that it bears the plaintiff was operating under it. It is unusual in some of its particulars, but that is understandable. The circumstances would contribute to make it so; the size of the job—there is a suggestion in the evidence that there was no other local electrical contractor equipped to undertake it; the fact that as a result of the Union's demand the job was being interrupted with part of it done and much remaining to be done; the limited time given by the Union to the company within which to have "a recognized electrical contractor" commence to carry on from the point where the company would leave off. All the foregoing, and probably other factors which have not occurred to me, would almost necessitate the unusual terms. In any event it was a contract into which the plaintiff and the company were at perfect liberty to enter. It was for them alone to decide upon its terms, and it was no business of the Union or anyone connected with it, what those terms were. In this court I did not understand counsel for the appellants to contend that it was not a perfectly valid contract.

Implicit in that contract were rights and obligations which were correlative. Each party to it was entitled to performance of it by the other, and to the benefits resulting therefrom. The plaintiff was entitled to the protection which the law affords against his rights and benefits under that contract being jeopardized by wrongful conduct of the defendants or any of them.



That all the defendants, and particularly the defendant Raymond, sought to extinguish them entirely there can be no doubt. The defendant Raymond did not attempt to hide his intentions. He expressed them in the clearest possible language. He sought to accomplish his purpose by the divers means set out in the résumé of facts which I have already given. Those acts were wrongful and it makes no difference whether, in committing them, he was acting in concert with others or independently, and that also applies to the acts of his co-defendants.

Fortunately the defendants did not succeed in accomplishing their purpose, but the plaintiff was not required to wait until all the damage was done. He was entitled to apply to the Court for an injunction order restraining the defendants from proceeding further to accomplish their purpose.

In *Allen v. Flood*, [1898] A.C. 1, Lord Watson, at p. 96, laid down the following legal propositions which have oft-times since been quoted:

“There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party, and in that case, according to the law laid down by the majority in *Lumley v. Gye*, 2 E. & B. 216 [118 E.R. 749], the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party.”

It is trite law that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference, and for that proposition it will be sufficient to cite the judgment of Lord Macnaghten in *Quinn v. Leathem*, [1901] A.C. 495 at 510.

If I followed the argument of counsel for the appellants correctly, he did not try to escape from that principle. He faced up to it and argued that the appellants came within the exception because there was justification for their interference.

In *Read v. The Friendly Society of Operative Stonemasons of England, Ireland and Wales et al.*, [1902] 2 K.B. 732, the

defendants sought to justify their interference with the plaintiff's contract of apprenticeship. The justification there put forward was thus stated by Collins M.R. at p. 737:

"In these circumstances they conspired to enforce, by threats of a formidable character which they had the means of carrying into effect, a breach by his employers and instructors of the contract which the latter had with him; and the only justification they can suggest for this conduct is that Messrs. Wigg & Wright had come under an obligation to them, not perhaps legally enforceable, if not illegal, not to make such a contract as they had made with the plaintiff."

Then dealing with that so-called justification, he continued:

"But the justification to be of any avail must cover their whole conduct, the means they used as well as the end they had in view. . . . But to combine to coerce them, by threats of the character I have described, to break their contract with the plaintiff was in my judgment an illegal act carried out by illegal means."

All that counsel for the appellant here puts forward by way of justification does not amount to such. In *Read v. Friendly Society*, *supra*, Collins M.R., at p. 737, deals with that type of alleged justification thus:

"Belief, however honest, that in what they did they were acting in the best interest of the society of masons could be no excuse for conspiring to deprive the plaintiff of the advantages of his contract. Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if it is effectual in bringing about a breach of the contract to the damage of that person, gives a cause of action [citing *Lumley v. Gye*, *supra*] and a strong belief on the part of the persuader that he is acting for his own interests does not seem to me to improve his position in any respect. Still less can it do so when he does not confine himself to persuasion, but joins with others to enforce their common interests at the plaintiff's expense by coercion."

Here, there was a wrongful conspiracy not only between Raymond and his co-defendants, but also between them and the employees of the plaintiff who refrained from going to work on the morning of 27th May, following the meeting of the night before. I am thoroughly satisfied that at that meeting Ray-

mond not only applied peaceful persuasion, but at the least implied threats of Union sanctions against those men in order to induce them to remain off the job. The fact that they yielded made them also conspirators, and if they, too, had been sued it would have been no answer for them to say that they were simply obeying orders.

In *Crofter Hand Woven Harris Tweed Company, Limited et al. v. Veitch et al.*, [1942] A.C. 435, [1942] 1 All E.R. 142, Viscount Simon L.C., at p. 441, deals with such a situation as follows:

“The respective position of the two men in the hierarchy of trade union officials has nothing to do with it. Even if Mackenzie could be regarded as only obeying orders received from his superior, the combination would still exist if he appreciated what he was about.”

To me it is crystal-clear that the combination between the defendants and others had as its ultimate objective the inducing of a breach by the Austin company of its contract with the plaintiff. It was part of the strategy of the defendants in calling the walkout to put the plaintiff in the position, if possible, where the Austin company would find it to its advantage to terminate its contract with him, because of the difficulties which these defendants sought to bring about. It is ridiculous, in my opinion, to suggest that Raymond was a mere spokesman for the members of the Local, transmitting to the plaintiff and the Austin company decisions reached by the membership. To hold that he was only such a messenger would be to discount the importance of the position he held, and the power and the influence he exerted. He dictated the strategy that was to be followed. The record is replete with illustrations of the power he wielded, and his “yen” to demonstrate that power. Unfortunately he found, in his co-defendants and others, a willingness to combine with him in attempting to prove themselves masters of the situation. The sanctity of the plaintiff’s contract meant nothing to him or them. The plaintiff could have any other contract, but not this one. The wishes of the men on the job were flouted. They must get off the job and stay off.

I think para. (b) of the injunction should be varied by adding after the word “plaintiff” in the third line thereof, the



words "on the Dow Chemical job under his contract with The Austin Company Limited" or words to like effect, and that similar words should be added at the end of that paragraph.

Apart from the foregoing this appeal is entirely without merit, and should be dismissed with costs.

AYLESWORTH J.A.:—I have read the judgments in this appeal of my brothers Laidlaw and Roach. I not only agree in the result reached by them but also agree with their reasons as expressed in their respective judgments.

*Appeal dismissed with costs, subject to a variation in the terms of the injunction.*

*Solicitors for the plaintiff, respondent: Mathews, Stiver, Lyons & Vale, Toronto.*

*Solicitors for the defendants, appellants: Dawson & Nethery, Sarnia.*

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[MACKAY J.]

**Canadian Motion Picture Productions Limited v. Maynard Film Distributing Company Limited et al.**

*Arbitration—Effect of Submission Clause in Contract—Inapplicability to Claim for Rescission Based on Fraud, Misrepresentation or Undue Influence—The Arbitration Act, R.S.O. 1937, c. 109, s. 7.*

A clause in a contract providing that no action shall be brought "as a result of any matter or thing in dispute between the parties hereto or as to anything arising out of this agreement", but that such questions or matters shall be referred to arbitration, cannot operate to entitle the defendant to a stay of an action in which the plaintiff seeks to set aside the contract on the ground of fraud, misrepresentation or undue influence. Such a claim involves the issue whether the contract containing the clause has ever been validly entered into, and the party who denies that he has entered into the contract thereby denies that he has ever joined in the submission to arbitration. *Heyman et al. v. Darwins, Limited*, [1942] A.C. 356; *Monro v. Bognor Urban District Council*, [1915] 3 K.B. 167, applied.

A MOTION by the defendant company for a stay of the action.

27th to 30th June 1949. The motion was heard by MACKAY J. in Weekly Court at Toronto.

*K. V. Stratton, K.C.*, for the defendant company, applicant.

*W. J. P. Jenner, K.C.*, for the plaintiff, *contra*.

14th July 1949. MACKAY J.:—On the 4th January 1949 a motion was made on behalf of the plaintiff for an order restrain-

ing by an injunction the defendant corporation, its officers, servants, workmen and agents from exhibiting, distributing or causing to be exhibited or distributed to exhibitors, and/or disposing of any rights to exhibit or to distribute the film "Sins of the Fathers" until the trial of an action brought by the plaintiff against the defendant corporation by writ issued the 9th December 1948. The statement of claim, delivered on the 30th December 1948, is in part as follows:

"4. The plaintiff alleges that on or about the 20th day of May, 1948, it was induced by the fraudulent representations made by E. Paul Maynard, the Executive Officer of the defendant Company, and made as its agent to enter into an agreement with the said defendant Company whereunder the said defendant Company was granted the sole and exclusive right to exhibit and to distribute or to cause to be exhibited or distributed (throughout the world) the film 'Sins of the Fathers' for a period of seven (7) years and that the said representations were made to induce the plaintiff to enter into the said agreement dated May 20th, 1948. Particulars of the said fraudulent and untrue representations are, namely:

"a. That the defendant Company was the largest independent motion picture distributor in Canada and that it had an organization from coast to coast with offices in the main centres.

"b. That the picture 'Sins of the Fathers' required special exploitation and treatment and that his organization had the necessary experience and ability to do all that was necessary in this regard.

"c. That the brother of the defendant, E. Paul Maynard, was being brought into the defendant Company's organization to do the special publicity exploitation work on the picture 'Sins of the Fathers'.

"d. That the said agreement was the standard form of contract entered into between producer and distributor, excepting for the clauses relating to insurance upon the life of the defendant, E. Paul Maynard.

"e. That Laurence Cromien was to be given a position with the defendant Company, later set at Seventy-five dollars (\$75) per week and that credits would be given to the directors, writer, actors and producers of the picture 'Sins of the Fathers'.

"f. That the defendant, E. Paul Maynard, and the defendant Company had connections with independent motion picture dis-

tributors in the United States who made a practice of buying state rights of independently produced pictures and that world rights to exhibit the picture outside Canada could be sold within six (6) weeks after the said agreement had been signed for a minimum sum of One hundred and fifty thousand dollars (\$150,000) payable in American funds.

“g. That the defendant Company would keep a proper set of books and provide monthly statements to the plaintiff, supported by statements from the theatres in which the picture was shown.

“5. The plaintiff further alleges that the defendants, E. Paul Maynard and Margaret Maynard, executed the said agreement as guarantors in respect of a minimum payment of Seventy thousand dollars (\$70,000) to be made to the plaintiff under the terms of the said agreement.

“6. The plaintiff alleges that the aforesaid representations were made first in the City of Montreal on or about the 30th day of April 1948 and later repeated in the City of Toronto prior to the execution of the said agreement, and that such representations were untrue and fraudulently made with the intention of inducing the plaintiff to enter into the said agreement dated the 20th day of May, 1948.

“7. The plaintiff further alleges that the defendant Company has failed to carry out the terms of the said agreement dated the 20th day of May, 1948 in that the said defendant Company has not kept full, true and accurate books and records of account setting forth in approved bookkeeping practice the monies received and the recoupable expenses incurred by the licensee, the defendant Company, and the said defendant Company has failed to render proper monthly statements as provided for in the said agreement and/or to produce and make available for inspection by the plaintiff or its accountants such books and records and supporting vouchers.

“8. The plaintiff further alleges that the defendant Company has failed to produce statements from the theatres, namely, exhibitors box office statements and film remittance slips and statements of sale of books from the theatres in which the picture was shown.

“9. The plaintiff further alleges that statements submitted by the defendant Company cannot be reconciled with the defend-



ant Company's books or with other statements submitted by the defendant Company.

"10. The plaintiff further alleges that in a statement dated November 1st, 1948, submitted by the defendant Company, there is shown payment of a sum of Five hundred dollars (\$500) for 'Variety Story' for second week at Royal Alexandra Theatre, Toronto, and that this amount was not so paid and that the claim therefor by the defendant Company is made with intent to defraud the plaintiff herein.

"11. The plaintiff further alleges that in the statement dated November 1st, 1948, submitted by the defendant Company, payment is alleged to have been made for one fine grain negative (second negative for insurance) in the amount of Two thousand five hundred and sixty-six dollars and ninety-five cents (\$2,566.95), that such payment has not in fact been made by the defendant Company for the items as alleged and such claim is made by the defendant Company with intent to defraud the plaintiff.

"12. The plaintiff further alleges that the defendant Company claims to have paid to Sidney S. Brown the sum of Two hundred and fifty dollars (\$250) for stage lecture in connection with the picture 'Sins of the Fathers' and that such monies were not, in fact, paid for the stage lecture and that the claim by the defendant Company therefor is made with intent to defraud the plaintiff.

"13. The plaintiff further alleges that the defendant Company claimed to have received 20% of the box office receipts from the second week showing at the Granada Theatre in Hamilton and that the defendant Company did, in fact, obtain 30% of such box office receipts (less legitimate deductions).

"14. The plaintiff further alleges that the books 'Sins of the Fathers' referred to in the said agreement dated May 20th, 1948 were sold at the Century Theatre, Kitchener, Ontario, during the period October 18 to October 20, 1948 at One dollar (\$1) per book and that the defendant Company's records do not show any sales of books 'Sins of the Fathers' at more than Fifty cents per book and that in this respect the defendant Company's books of record are false and incorrect.

"15. The plaintiff further alleges that the defendant Company has claimed for recoupable expenses many items including

payments made to commentators and nurses and commission on sale of books 'Sins of the Fathers' and that such payments are, in fact, not recoupable expenses under the terms of the said agreement dated the 20th day of May, 1948.

"16. The plaintiff further alleges that the books and records of the defendant Company do not properly and accurately set forth a full, true and accurate state of account as between the plaintiff and the said defendant Company.

"17. The plaintiff further alleges that the defendant Company has in exhibiting or permitting the picture 'Sins of the Fathers' to be exhibited failed to see that the lecture, as approved by the Board of Censors, is presented as required with the result that exhibition of the said picture in Ontario has been temporarily or permanently prohibited.

"18. The plaintiff further alleges that the said agreement dated May 20th, 1948 is not a standard form of contract inasmuch as the standard form of contracts between producer and distributor contain provisions for the protection of the producer in respect of:

"a. Proper records to be produced by the distributor for accounting purposes, and,

"b. Provision for approval by the producer of contracts proposed to be entered into by the distributor in respect of rights to exhibit and distribute the picture the subject of the contract.

"19. The plaintiff further alleges that the defendant Company has, in the manner hereinbefore set out, negligently and/or fraudulently failed to carry out the terms of this agreement with the plaintiff and that unless the defendant Company is restrained from entering into any further contracts for the exhibition and/or the distribution of the said film 'Sins of the Fathers' and from the sale of any rights to exhibit the said film, the plaintiff Company will suffer irreparable damage.

"20. The plaintiff has repudiated the agreement entered into between the parties hereto and dated May 20th, 1948 for the reasons herein set out."

The plaintiff therefore claims:

(a) rescission of the agreement between the plaintiff and the defendants dated 20th May 1948;

(b) in the alternative, rectification of the said agreement so as to provide proper protection for the plaintiff;

(c) an accounting and payment of such sum as may be found due to the plaintiff;

(d) an injunction restraining the defendant company, its servants and agents, from any further dealings in the said picture "Sins of the Fathers" under the terms of the said agreement dated 20th May 1948, and

(e) further and other relief.

On the 13th January 1949 the defendant corporation moved the Court for an order staying the proceedings in the said action pending reference to arbitration of the matters in dispute.

On the 20th May 1948 the plaintiff corporation, hereinafter called "the licensor" of the first part, entered into and duly executed an agreement with the defendant corporation, hereinafter called "the licensee" of the second part, and E. Paul Maynard and his wife Margaret Maynard, hereinafter called "the parties of the third part", whereby, *inter alia*, the licensor granted and the licensee accepted the sole and exclusive right to exhibit and to distribute or to cause to be exhibited or distributed to exhibitors for exhibition of 35 mm. and 16 mm. prints, sound tracks and sound records of the said film throughout the world, for a period of seven years from the date thereof. The contract is composed of 26 paragraphs and deals in marked detail with all relevant aspects of the agreement. Para. 23 of the said agreement is as follows:

"No action shall be brought in any Court as a result of any matter or thing in dispute between the parties hereto or as to anything arising out of this agreement; but in case the parties cannot agree the question or matter or thing in dispute shall be settled by arbitration. Such arbitration shall be in the usual form whereby each party appoints one arbitrator and the two arbitrators appoint a third arbitrator and in default thereof such third arbitrator shall be appointed by a Judge of the County Court of the County of York. The terms of The Arbitration Act (Ontario) shall apply to the arbitration and all parties agree to be bound by the award of the arbitration without appeal. The proceedings before such board of arbitration shall take place in the City of Toronto, in the Province of Ontario."



A direction was made by the Court that the defendants' motion for a stay of proceedings should be first heard. This motion was fully argued on the 27th, 28th, 29th and 30th June 1949.

Counsel for the plaintiff submitted four grounds in opposing the motion for a stay:

(1) The submission clause is illegal and void as against public policy.

(2) The cause of action is outside the scope of arbitration inasmuch as fraud is alleged.

(3) The defendant took a step in the proceedings.

(4) A stay is a discretionary matter and judicial discretion should be exercised by refusing the stay.

The Arbitration Act, R.S.O. 1937, c. 109, s. 7, is as follows: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceeding may at any time after appearance and before delivering any pleading or taking any other step in the proceeding apply to that court to stay the proceeding, and that court, or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceeding was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceeding."

I am of opinion that the terminology of the submission clause does not and cannot rightly be construed to oust the jurisdiction of the Court, and therefore does not fall within the principles enunciated in *Scott v. Avery* (1856), 5 H.L. Cas. 811 at 845, 847, 854, 10 E.R. 1121.

I am further of opinion that the contention of counsel for the plaintiff that the defendant took a step in the proceedings is not maintainable. Counsel for the plaintiff submits that inasmuch as counsel for the defendant cross-examined the officers of the plaintiff corporation more exhaustively than might have been strictly necessary, for the purpose of this motion, this constituted a step in the proceedings. Such a

restraint on the cross-examination on an affidavit, at the peril of taking a step in the proceedings, is not, in my opinion, in accordance with the law.

If the claim comes within the submission to arbitration, it is clear that under s. 7 of The Arbitration Act the power of the Court to stay an action under the arbitration clause is a matter of discretion and not *ex debito justitiæ*. This discretion must, of course, be exercised judicially.

The contention of counsel for the plaintiff that the cause of action is outside the scope of arbitration, because fraud is alleged, involves a point of law nice in its distinction.

In *Heyman et al. v. Darwins, Limited*, [1942] A.C. 356, [1942] 1 All E.R. 337, a judgment of the House of Lords (Viscount Simon L.C., Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), the submission clause was in the following terms:

"If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act, 1889, or any then subsisting statutory modification thereof."

Section 4 of the English Arbitration Act is identical with s. 7 of the Ontario Act.

In the *Heyman* case Cassels J., agreeing with the Master, held that the dispute did not fall within the arbitration clause, and refused to stay the action. The Court of Appeal (Scott, MacKinnon and Luxmoore L.JJ.) took a contrary view and held that the arbitration clause clearly applied, and that the judge misconceived the scope and purport of his discretion in refusing the stay. The House of Lords sustained the Court of Appeal. This case differs materially from the case at bar, but inasmuch as it reviews the law it is most useful and the general principles enunciated are most helpful.

Viscount Simon, at p. 366, says. "An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue

cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void."

In a word, is the difference which has arisen between the parties one "in respect of" or "with regard to" or "under" the contract? To quote Viscount Simon: ". . . an arbitration clause which uses these, or similar, expressions should be construed accordingly."

Viscount Simon continues: "By the law of England . . . such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer on the arbitral body express power to do so."

Lord Macmillan, at pp. 370-1, says: "I may clear the ground by disposing of one or two simple cases. If it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject-matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement."



If the dispute is within the submission clause, then although there is a discretion in the Court, the Court before refusing a stay should be satisfied on good grounds that it ought not to stay.

Lord Wright, at p. 388, says: “. . . the court must be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though in truth an arbitration clause is not of strict obligation, because it is, under s. 4 [our s. 7], always subject to the discretion of the court. In the present case the judge (agreeing with the master) has exercised his discretion against the application of the arbitration clause. The Court of Appeal reversed the decision of the judge. The judge's discretion is indeed primary, but it is subject to appeal. The duty of appellate courts on an appeal against the exercise of a discretion has been examined by this House in *Evans v. Bartlam*, [1937] A.C. 473, and in *Charles Oseinton & Co. v. Johnston*, [1942] A.C. 130 [[1941] 2 All E.R. 245]. It is enough here to say that the appellate court will only set aside the discretionary order if satisfied that it is clearly wrong. It will make every reasonable presumption in favour of upholding the judge.” And later: “. . . if the submission is general, it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law.”

The point of law which falls for determination in this motion is whether the dispute, or a part of it, as set forth in the statement of claim of the plaintiff, is or is not a dispute “as a result of any matter or thing in dispute between the parties hereto or as to anything arising out of this agreement”, within the meaning of the arbitration clause.

This point of law appears to have been decided in definite terms in *Monro v. Bognor Urban District Council*, [1915] 3 K.B. 167. That was a judgment of the English Court of Appeal allowing an appeal from the order of Lord Coleridge J. affirming an order of the Master (Archibald) that all further proceedings in the action be stayed pursuant to s. 4 of The Arbitration Act, 1889. The facts are set out fully in the judgment. A short summary is: On February 16th, 1914, a contract was entered into between the plaintiff and the defendants for the construc-

tion by the plaintiff of certain sewerage works for the defendants. The contract contained an arbitration clause in the following terms: "If at any time any question, dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer [naming him] or failing him by a person to be mutually agreed upon or failing agreement to some person appointed by the president for the time being of the Institute of Civil Engineers." The specification in accordance with which the work was to be done contained the following clause: "A bore-hole has been sunk upon the site, and it has been ascertained that the top eighteen feet of the subsoil consists of somewhat wet very loose sand and clay and below this depth the strata is of stiff clay." The plaintiff commenced work under the contract, but after a time ceased to do any more work, alleging that he had been misled into making the contract by fraudulent misstatements in the specification. He then brought an action against the defendants, in which he sought to recover damages for fraudulent misrepresentation by the defendants whereby he was induced to enter into the contract, and also sought an injunction to restrain the defendants from using or in any way dealing with the plaintiff's plant and materials on the defendants' premises. There were various other claims set forth in the statement of claim, including a claim for a declaration that the contract was void and should be rescinded. The defendants took out a summons to stay the action and to refer it to arbitration under the arbitration clause in the contract, and under s. 4 of The Arbitration Act, 1889. The Master made an order staying the action, and referring it to arbitration and upon appeal Lord Coleridge J. affirmed his decision. The plaintiff appealed to the Court of Appeal.

It is clear that the submission in the arbitration clause in the case at bar is in much more general terms than that of the submission clause in *Monro v. Bognor Urban District Council*, *supra*. In the case at bar the scope of the submission clause is as follows: "No action shall be brought in any Court as a result of any matter or thing in dispute between the parties hereto or as to anything arising out of this agreement . . ."

In the *Monro* case the Master found, after a careful examination of the plaintiff's affidavit and cross-examination thereon,

that in his opinion there was no ground for the charge of fraud. Pickford L.J. says: "Now I do not think that that question was for the Master at all . . . it is [not] in relation to or in connection with the contract . . . within the meaning of the arbitration clause. That being so, I think the action is with reference to matter wholly outside the powers of the arbitrator, and with which he could not possibly deal. It may be a very bad action; the Master thinks it is. The defendants, if they have a sufficiently strong opinion about it and if they have sufficient materials to do so, have the power to apply to stay the action or to dismiss it as being frivolous and vexatious, or on the ground that the claim discloses no cause of action, or that it is an abuse of the process of the Court. They have all those steps that they can take if they think fit."

Banks L.J., agreeing with Pickford L.J., says, at p. 173: "The only point is whether the claim which is brought—whether it is good, bad, or indifferent—comes within the submission to arbitration. I am not saying it by way of encouragement, but it may be there are grounds upon which the defendants could satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious. They may be able to do so upon the ground which seems to have induced the Master to take the action he did, or they may do it on the ground which seems to have induced the learned judge to take the view he did . . . but those considerations which seem to have affected the Master and the learned judge are material, and material only, as it seems to me, if the question they had to consider was whether the case made was a frivolous and vexatious one and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was. One can only find out what his claim is by looking at the writ, if the matter has not gone beyond the writ, or his statement of claim, if it has arrived at that stage. I think that the decision of the Master and the decision of the learned judge were founded upon a misapprehension of the real question which had to be decided, and however inconvenient it may be to the defendants, who naturally desire that any dispute shall be settled by arbitration, it seems to me that our only course is to allow this appeal and to say that the plaintiff's present claim is not within the scope of the submission."



It is clear, as indicated before, that the submission clause in the case at bar is in the widest terms, but certain aspects of the claim, namely, misrepresentation and undue influence, raise the issue whether the contract which contains the clause has ever been entered into at all, and that issue, in the words of Viscount Simon in *Heyman et al. v. Darwins, Limited, supra*, "cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission." Viscount Simon continues: "Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void."

I am of opinion, notwithstanding that this may mean that the mere allegation of misrepresentation, fraud or undue influence is sufficient to remove that specific claim from the operation of the arbitration clause, that such is the case. I can place no other interpretation on the law as laid down by Viscount Simon. Indeed, I am, in my opinion, bound by the *ratio decidendi* in *Heyman et al. v. Darwins, Limited*.

I am, however, constrained to say, after a careful perusal of 1,000 pages of examination and cross-examination in the material filed on this motion, that such allegations—fraud, undue influence and misrepresentation—appear to rest, if they rest at all, on a most insecure foundation.

It is almost unnecessary to say that all aspects of the plaintiff's statement of claim except fraud, undue influence and misrepresentation are within the submission clause.

The order of the Court is that the motion for a stay referable to undue influence and misrepresentation is dismissed. There is no order as to costs.

The following additional authorities have been examined: 1 Halsbury's Laws of England, 2nd ed. 1931, p. 628, para. 1076; 23 Halsbury, 2nd ed. 1936, p. 96, para. 135; *Doleman & Sons v. Ossett Corporation*, [1912] 3 K.B. 257; *Printing Machinery Company, Limited v. Linotype and Machinery, Limited*, [1912] 1 Ch. 566; Russell on Arbitration and Award, 13th ed. 1935, pp. 71, 84; *Lee v. Page* (1861), 30 L.J.Ch. 857; *The Dufferin Paving Co. Ltd.*

v. *The George A. Fuller Co. of Canada Ltd.*, [1935] O.R. 21, [1935] 1 D.L.R. 538.

*Order accordingly.*

*Solicitors for the plaintiff: Jenner & Brunt, Toronto.*

*Solicitors for the defendants: Lawson, Stratton, Green & Ongley, Toronto.*

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[WELLS J.]

Gray et al. v. McGonegal et al.

*Schools—Liability of Teacher and Trustees—Supplying of Hot Food to Pupils—Instructions to Pupil to Light Gasoline Stove—Failure to Take Precautions—Contributory Negligence—Time of Action—The Public Authorities Protection Act, R.S.O. 1937, c. 135, s. 11.*

Although the supplying of hot food to pupils is not part of the statutory duty of a teacher toward his pupils, yet if the practice of supplying it is adopted and continued with the knowledge and approval of the trustees it is within the ambit of the teacher's employment, and the trustees will be liable for negligence of the teacher therein, if, *e.g.*, she fails to exercise that care toward the pupils that would be exercised by a careful parent. *Williams v. Eady* (1893), 10 T.L.R. 41 at 42; *Smith v. Martin and The Corporation of Kingston-upon-Hull*, [1911] 2 K.B. 775, applied. Section 11 of The Public Authorities Protection Act will not apply to an action for such negligence, since the action is not based upon anything done by the defendant in pursuance or execution of any statutory or other public duty or authority. *Levine v. Board of Education for The City of Toronto*, [1933] O.W.N. 152; *Bradford Corporation v. Myers*, [1916] 1 A.C. 242, applied.

AN ACTION for damages.

29th and 30th November and 1st December 1948. The action was tried by WELLS J. without a jury at Brockville.

*W. M. Nickle, K.C.*, for the plaintiffs.

*C. M. Smith, K.C.*, for the defendant trustees.

*H. C. Wilson*, for the defendant McGonegal.

7th September 1949. WELLS J.:—This action arises out of a serious misadventure suffered by the infant plaintiff on or about 12th June 1947, when, as a result of his attempting to light a gasoline stove at school to heat some soup for the pupils, he was most seriously burned. His father sues for him as his next friend and in his personal capacity for expenses suffered as a result of the accident.

It is admitted in the pleadings that the defendant Hazel McGonegal was the teacher of the school at the time when and

where the accident occurred, and that she was duly employed as such teacher by the defendant trustees. The facts, about which there is some conflict of evidence in detail, are reasonably simple, and in their main aspects are not controverted by any of the witnesses.

It appears that it had been the custom in this public school, which the defendant trustees operated under the statutes in that regard, and which is referred to by the witnesses as "Legges' School", to serve a hot dish as part of the pupils' lunch, it being apparently the custom for most of the children to bring their lunches to school. This custom obtained particularly during the cold weather, and would seem to have been a most praiseworthy one. It was a custom that was carried on by the teacher with the knowledge of the trustees and with their approval, and, as one of them said in the witness-box, it was left to her to decide when hot food should be served to the pupils. On this occasion, it being late in the school year, the defendant Hazel McGonegal decided to use up her supplies of soup by heating them and distributing them among her pupils at lunch. Ordinarily this soup was prepared on a wood stove which was used for heating the school building, and these fires were, apparently, ordinarily prepared and lit by the infant plaintiff, who is the son of the school caretaker.

When the infant plaintiff was asked to light the wood stove he objected that it was too hot, and apparently kindling was not available. There is some dispute as to who suggested that the gasoline stove, which was part of the school equipment, should be used. It was, however, suggested. This stove had apparently belonged to the school for quite a long time, as it is listed in the school equipment book, which was produced before me, and which record was commenced in June 1933, as "1 Coleman stove" and appears in that book prior to entries which were apparently made in the years 1937 and 1938. I find also in this book, in which accounts connected with the hot lunch equipment of the school are entered, that there were repairs to the stove in the year 1937, so that it was apparently there ten years before the day which I am now considering.

At this point there is some conflict in the evidence. The plaintiff Willis Edwin Gray, the father of the infant plaintiff, says that he saw the defendant McGonegal when she first arrived,



told her that he was the caretaker, and mentioned the gas stove as being in the school cupboard, but told her that it should be repaired before it was used. On cross-examination the same witness said that the defendant McGonegal assured him that she was not familiar with the stove and would not use it, and he also testified that he had told his son Charles not to touch it. This the defendant McGonegal flatly denied. Her version of what occurred was that the children were out playing and that she called Charlie and asked him if he would make a wood fire; that he demurred and suggested that they use the gas stove. The reason he demurred, she thought, was that there was no light wood available, and that it was inconvenient. Miss McGonegal said that she asked the infant plaintiff if he could light the gasoline stove, and that he took it out and answered "yes" to her question as to his ability to light it. At this time the infant plaintiff was 12 years of age, having become so on the 12th March previous. When I saw him in the witness-box I came to the conclusion that he was a bright and intelligent little boy, but, even despite this, in my opinion he was still very much a little boy at the time this accident occurred.

It is quite clear on the evidence that the defendant McGonegal supplied him with the stove, some three matches and a can of gasoline. Charles Gray's version of what occurred was that the defendant McGonegal told him to take the stove out and light it, and that he took it out into the schoolyard. He claimed that he said he did not know how to light it, but she told him to take it out anyway, and she gave him the matches with which to light it. It is quite obvious from the account of what happened that the infant plaintiff did not know how to light the stove, and he apparently splashed gasoline into the priming-cup without turning the stove on, and attempted to light the stove. The first attempt was not successful, but before he had exhausted the three matches the gasoline itself, or the vapour, ignited on the lighting of one of the matches, and the cotton trousers he was wearing caught fire and one leg was very badly burned from the groin to the ankle, to such an extent that a very large skin-graft had to be made. He was incapacitated for over a year, and has certain very serious permanent disabilities, to which I shall allude later.

Miss McGonegal said that she had told him finally to abandon attempts to light the stove and to come in with the other children. The infant plaintiff's story is the exact opposite of this, and is to the effect that he was told to light the stove outside, and that he was obeying instructions from his teacher when the accident occurred.

In considering where the truth lies in this conflict, it is somewhat interesting to look at the defendant McGonegal's statement of defence. Paras. 7 to 10 set out her version of the facts in the pleadings, but whether or not the infant plaintiff was told to light the gasoline stove after he had told his teacher that he did not know how to, it is quite clear that the defendant McGonegal must have realized the danger of using the gasoline because she insisted on the boy taking the stove outside and attempting to light it in the schoolyard. It is quite clear that she supplied him with the gasoline and matches, and that while she watched him attempting to light it, when he failed to get it going she went into the school with the other pupils and shut the door, and whether or not she told him to come in, she did not insist on obedience, but left him outside with matches, gasoline and the stove, which she must have known was not functioning, and which the infant plaintiff was still attempting to light when she left him. She was in a position of authority over him as his teacher, and also in a position of responsibility toward him. The duty of a schoolmaster or mistress toward his or her pupils has been discussed many times, and is no more succinctly or better set out than in the judgment of Lord Esher M.R. in the case of *Williams v. Eady* (1893), 10 T.L.R. 41 at 42, where he said:

"... as to the law on the subject there could be no doubt; and it was correctly laid down by the learned Judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way."

It is interesting to note that the boy in question in that case was some 17 years of age.

It would appear to me that the defendant McGonegal completely failed in showing any sense of responsibility toward the

infant plaintiff; that she allowed him to play and experiment with a very dangerous and explosive substance, with matches; that she did not in any way exercise the control and care which any parent would be expected to exercise toward a child under similar circumstances, and that she completely failed in her duty towards this pupil.

I must find as a fact that Charles Gray attempted to light the stove as a result of instructions given him by the defendant McGonegal, and I accept his evidence that he protested his ignorance of how to do it, and that nevertheless he was told to go ahead and was obeying her instructions when the gasoline ignited and his clothing caught fire, with the result I have mentioned.

While I think it is quite clear that the providing of hot meals for children is not part of the statutory duties of the teacher towards the pupils, it is nevertheless something which was done under the directions and approval of her employers, the trustees, and was within the ambit of her employment by them. In many aspects the circumstances of this case bear close comparison with the facts in the case of *Smith v. Martin and The Corporation of Kingston-upon-Hull*, [1911] 2 K.B. 775. That decision would also seem to be authority for holding the co-defendants, the Trustees of the Leeds and Lansdowne Front Township School Area, liable, unless certain other considerations arising under The Public Authorities Protection Act, to which I shall later allude, alter the situation. In my opinion, on the facts established by the plaintiff in this case, it is quite clear that the defendant McGonegal hopelessly failed in exercising the care of this infant that her position demanded she should exercise, and that she was negligent in permitting him to attempt to light the stove, in giving him the gasoline and matches and in leaving him alone with them after she knew that he was having difficulty in achieving the object she desired.

This view is further strengthened by the decision in *Yachuk et al. v. Oliver Blais Co. Ltd.*, [1949] A.C. 386, [1949] 2 All E.R. 150, [1949] 3 D.L.R. 1, which restored the judgment of the Court of Appeal of this Province, [1945] O.R. 18, [1945] 1 D.L.R. 210, where the principle stated by Lord Denman in *Lynch v. Nurdin* (1841), 1 Q.B. 29 at 38, 113 E.R. 1041, was relied on by McRuer J.A. (now C.J.H.C.) in his judgment. The words



used by Lord Denman apply appropriately to the circumstances before me, and are as follows:

"The most blameable carelessness of his servant having tempted the child, he [the defendant] ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shewn these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it."

It is quite clear that, although on the pleadings it is alleged that the infant plaintiff was injured by what is called "the blowing up of the stove", it was not the stove that blew up, but the gasoline which the infant plaintiff had been pouring into the priming-cup, as apparently the stove had never been properly turned on, and, if the plaintiff is so advised, leave is now given to amend the statement of claim by setting out the facts as they were proved at the trial. Objection is taken to this, particularly by the defendant trustees, but I do not think it can be said that they were caught by surprise, as the essential basis of my finding of negligence does not rest on whether or not the stove blew up, but on the permitting by the teacher of the boy's attempt, on his own, to ignite the stove, and the giving to him of matches and a quantity of such a dangerous and explosive substance as gasoline, and the final act of leaving him alone with it without any supervision whatever. These facts the defendants have always known they had to meet, and they are the real basis on which the plaintiffs' claim can be allowed. An order accordingly will go permitting such amendments, if the plaintiff is so advised.

The question now arises whether the liability arising from the defendant McGonegal's negligence is chargeable to her co-defendants, the Trustees of Leeds and Lansdowne Front Township School Area. There would seem to me to be no doubt, and it is in fact admitted in both defences, that she was a properly-employed teacher of the school at the time the accident occurred. But it is alleged that the action not having been brought until a year after the accident in question, it is barred by the provisions of The Public Authorities Protection Act, R.S.O. 1937, c. 135, and in support of this view there is cited to me the judgment of Sedge-

wick J. in the case of *Levine v. Board of Education of The City of Toronto*, [1933] O.W.N. 152.

In terms, s. 11 of the statute might seem to be a bar to this action. However, I think the test is that indicated by Sedgewick J. in his decision cited, that is, whether the defendant was acting in pursuance or execution of any statutory or other public duty or authority. This duty, in so far as the teacher was concerned, is set out in s. 103 of The Public Schools Act, R.S.O. 1937, c. 337, and on any fair reading of this somewhat lengthy section, I do not think it can be said that the serving of hot foods to the pupils is part of the statutory duty of the school teacher. Our Public Authorities Protection Act is very similar to the Imperial statute which was considered by the House of Lords in the case of *Bradford Corporation v. Myers*, [1916] 1 A.C. 242, and while there the preamble, which is not contained in our statute, is relied on for the cutting-down of the wide words of the section, I think the principle enunciated applies to our Act. As Lord Buckmaster said at p. 247:

“In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply.”

Under these circumstances, in my view this defence is not available to the defendant trustees, and on the principles stated in *Smith v. Martin and The Corporation of Kingston-upon-Hull*, to which I have already alluded, they must also be held liable to the plaintiffs.

In so far as the question of damages is concerned, this has given me some difficulty. There is no question that this infant was most severely injured and suffered great pain and will bear all his life a very serious and permanent disability. Dr. Bingham, whose evidence I accept without any reservation, stated that any injury to the leg will result in most serious consequences, and that for many years the infant plaintiff may be faced with the

necessity for having expensive and troublesome operations in the nature of skin-grafting, from time to time.

The out-of-pocket expenses of the plaintiff Willis Edwin Gray were proved at \$1,208.75. I am not able to see that the other plaintiff, the mother Mildred Gray, has proved any damages which I can allow. In addition to these out-of-pocket expenses I must make an allowance to the infant plaintiff for his pain and suffering and permanent disability. Giving the matter the best consideration I can, I would fix this at the sum of \$8,000. There will, therefore, be a total recovery of \$9,208.75 for damages, by the plaintiffs Charles Gray and Willis Edwin Gray. The claim of Mildred Gray I dismiss without costs.

One other matter was raised by the defendants, to which I should allude. It was pleaded that there was contributory negligence here; that the infant plaintiff was old enough to have some sense of responsibility and knowledge of the dangerous nature of the substance which he was handling, and if the father's evidence is accepted, it would appear that he had been warned not to touch the stove. On the other hand, accepting as I do the evidence that what he did was done under the direct instructions and by the exercise of authority of the defendant Hazel McGonegal, who was in a position of authority over him, I do not think it can be said that because he did what he was told to do by his teacher, he himself was guilty of negligence. In the result, therefore, there will be judgment against both defendants for the sum of \$9,208.75 and costs.

*Judgment for plaintiffs.*

*Solicitor for the plaintiffs: W. M. Nickle, Kingston.*

*Solicitor for the defendant trustees: C. M. Smith, Kingston.*

*Solicitor for the defendant McGonegal: H. C. Wilson, Perth.*

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[WILSON J.]

**Thrush v. Read.**

*Judgments—Date—Reservation of Judgment by Trial Judge—Death of Defendant after Trial but before Delivery of Judgment — Order to Proceed against Defendant's Executors—Date to be Borne by Formal Judgment—Rules 300, 301, 513.*

A trial was concluded, and judgment was reserved, on 10th December 1948. Judgment was delivered on 2nd February 1949, dismissing the action. The defendant had died on 22nd January. Letters probate were issued to the defendant's executors on 24th March, and on the following day an order to proceed against them was made. Application was then made to settle the formal judgment, and a question arose as to the date the judgment should bear.

*Held*, the formal judgment should be dated 2nd February, in accordance with Rule 513, notwithstanding the intervening death of the defendant. The reserving of judgment was for the convenience of the Court, and should not be permitted to prejudice any of the parties. The defect in the action resulting from the defendant's death was cured by the order to proceed, and the action was thereafter fully constituted. No prejudice could result to any party from dating the judgment as of the day on which it was delivered, whereas the unsuccessful plaintiff might be prejudiced if it were dated the last day of the argument, as was done in *Gunn v. Harper et al.* (1902), 3 O.L.R. 693, and *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467. *Turner v. London and South-Western Railway Company* (1874), L.R. 17 Eq. 561, and other authorities, discussed.

AN APPLICATION to settle a formal judgment.

15th June 1949. The application was heard by WILSON J. in chambers at Toronto.

*W. C. Cuttell*, for the plaintiff.

*P. L. Slaght*, for the defendant.

22nd September 1949. WILSON J.:—This is an application to settle the formal judgment in an action in which the plaintiff's claim was dismissed. The action was brought to set aside certain transfers of an interest in a mining syndicate made by the plaintiff to the defendant, or, in the alternative, for damages. The trial took place at the city of Toronto on the 6th, 7th, 8th, 9th and 10th December 1948. Judgment was reserved.

On the 22nd January 1949 the defendant died. On the 2nd February I delivered judgment dismissing the action with costs. On the 24th March 1949 letters probate were granted to the defendant's executors named in the will, and on the 25th March, upon the plaintiff's application, an order to proceed was made against them. The question for determination is the date which the formal judgment should bear. The plaintiff and the executors, who are now the parties to the action, desire to have it

bear date 2nd February 1949 so that it will conform to the provisions of Rule 513, which reads:

"Every judgment or order shall show on its face the day of the week and month on which it was given or made and every judgment shall also show the date upon which it is actually signed, and (except judgments signed by default and *praecipe* orders) shall show the name or names of the Judge or officer who gave or made the same, and shall take effect from its date."

The learned Registrar of the Court, whose duty it is under Rule 527 to settle the form of the judgment, felt that he was bound by the decisions of the Court of Appeal in the cases of *Gunn v. Harper et al.* (1902), 3 O.L.R. 693 and *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467, to date it as of the last day of the argument at the trial.

The parties have applied to me under Rule 527(2) to vary the minutes of the Registrar so that the date of the judgment will be that on which it was delivered, namely, 2nd February 1949. Rule 527(2) reads: "When settled the minutes may be varied by the Trial Judge on the application of either party."

Some difficulty is encountered in tracing the history of the decisions upon this and other Rules relating to the delivery and entry of judgments. The English decisions must be read in the light of the English Rules of Practice, which, although usually not mentioned in the reasons for judgment, have always contained some relevant provisions of which the Courts were aware when pronouncing judgment.

For example, in the leading English case of *Turner v. London and South-Western Railway Company* (1874), L.R. 17 Eq. 561, which may be considered as having settled the practice in England (per Moss J.A. in *Gunn v. Harper et al.*, *supra*, at p. 695), the Vice-Chancellor reached the conclusion that he was able to deliver judgment and direct that it should be entered as of the date when the argument was concluded. In the report there is no reference to the Rules. Unfortunately, these are not available in our libraries.

The action was commenced on 30th August 1872, the trial took place on 20th and 21st January 1874 and judgment was delivered on 17th February 1874. It is difficult now to ascertain, and not essential to the present decision to determine, the Rules in force at the time of that case. The Supreme Court

of Judicature Act, 1873 (36 & 37 Vict., c. 66), which simplified the English practice and procedure, came into force on 2nd November 1874. Sections 68 to 74 provided for the continuance of certain Rules of Court, the enactment of new and amending Rules, and a set of 58 Rules in a schedule to the Act regulating new procedure. The Act was amended by The Supreme Court of Judicature Act, 1875 (38 & 39 Vict., c. 77), and new Rules were embodied in a schedule to the latter statute. There seems to be no doubt, however, but that the Rules did have some provisions comparable to the power given by Rule 629 of 1897 (Ont.), as will be seen from the text-books. The Rules of Order XLI passed under The Supreme Court of Judicature Act, 1875, are quite specific.

In Ontario there appear to be only the relevant decisions in *Gunn v. Harper et al.* and *Young v. Town of Gravenhurst*, *supra*, the latter of which followed the judgment given in the former action. Those judgments, however, were apparently based at least in part upon Rule 629 as passed in 1897 and it read as follows:

“629. Every judgment and order pronounced by the Court or a Judge shall be dated as of the day on which such judgment or order is pronounced, and shall take effect from that date, *unless otherwise directed*; and every judgment shall also bear upon its face the date upon which it is signed.

“(2) Every judgment by default shall be dated on the day on which it is signed.”

The words “unless otherwise directed”, however, do not appear in the present Rule 513, already quoted. They were removed in the general revision of the Rules in 1913 and the present wording was first adopted then in Rule 512.

In the case of *Gunn v. Harper et al.*, after argument of an appeal before the Court of Appeal, but before judgment was pronounced, the plaintiff died. In ignorance of his death the defendants applied for and obtained the issue of a certificate of judgment which bore date as of the day on which the judgment was pronounced. Moss J.A. at p. 695 stated:

“It is well settled that the death of a party to an action after hearing or trial does not prevent judgment being delivered, and that it is not necessary to obtain an order to proceed before drawing up or entering the judgment. But, with regard to the



proper form in which the judgment should issue and the date it should bear, the text books and forms of precedents afford little, if any, light. In England the practice as to dating does not appear to have been uniform. In some cases the date was of the day of argument, in others of the day of the delivery of the judgment. But, apparently, there was always a direction that entry should be made as of the day of the conclusion of the argument. For instances of both kinds, reference may be made to the notes furnished by the Registrar to Sir Charles Hall, V.-C., in *Turner v. London and South-Western R.W. Co.*, [*supra*]. In that case, which may be considered as having settled the practice in England, the plaintiff died after argument, and the Vice-Chancellor, having been informed of that fact before delivery of judgment, considered how he should deal with the case, and, after careful investigation and inquiry into the practice, reached the conclusion that he was able to deliver judgment and direct that it should be entered as of the date when the argument was concluded." And then he referred to the English cases. At p. 696 he continued:

"It may be taken as now settled that where, at the time of giving judgment the Court is aware that an abatement has occurred since the argument, it may direct the judgment to be dated as of the day when the argument terminated. Consolidated Rule 629 [now Rule 513] provides that every judgment and order pronounced by the Court or a Judge shall be dated as of the day on which such judgment or order is pronounced, and shall take effect from that date, unless otherwise directed. If the proviso applies to both the dating and taking effect of the judgment—as to which the corresponding English rule is clear—there is no difficulty in giving the direction. But, if confined to the taking effect of the judgment, the Court may pronounce judgment as of the day of the argument, for the reservation of judgment is for the convenience of the Court, and should not be permitted to operate to the prejudice of any of the parties."

The same point was also considered in the case of *Young v. Town of Gravenhurst*, *supra*. In that case one of the plaintiffs died after the argument in the Court of Appeal and before the delivery of the judgment. Chief Justice Moss at p. 475 dealt with the matter in this way:

"The death after judgment does not affect the cause of action, nor does it prevent the delivery of judgment upon the appeal.

"All that is necessary is, that the Court should direct that the certificate of the judgment should be entered as of the date when the argument was concluded.

"We give a direction to that effect. The practice is discussed in *Gunn v. Harper* (1902), 3 O.L.R. 693."

That an action abates upon the death of a sole defendant is quite clear from the decision in *In re Shephard; Atkins v. Shephard* (1889), 43 Ch. D. 131, a decision of the Court of Appeal in England which held that to be the effect of the provisions of Order XVII, from which our Rule 300 originally was taken in substance. Rule 300 reads as follows:

"If by reason of death (when the cause of action survives or continues) or by assignment or conveyance any estate, interest or title devolves or is transferred the action may be continued by or against the person to or upon whom such estate or title has come or devolved."

The proper procedure is to obtain a *praecipe* order to continue under Rule 301, which reads as follows:

"Where a change or transmission of interest or liability has taken place or where by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and the new party may be obtained on *praecipe*."

However, a careful consideration of the decision in *Gunn v. Harper et al.* seems to establish that the death of a party to an action after hearing or trial does not prevent judgment being delivered, and that it is not necessary to obtain an order to proceed before drawing up or entering the judgment.

As to the formal date which the judgment is to bear, Moss J.A. in *Gunn v. Harper et al.* at p. 696, confirms, in the last portion of his judgment already quoted, the long-established principle that the reservation of judgment is for the convenience of the Court and should not be permitted to operate to the prejudice of any of the parties. Although his enunciation of this

principle is applicable to this Province, it is made in a paragraph quoting a rule of practice which empowered the Court to direct that the judgment should be effective from a date other than that upon which it was pronounced. The principle itself, apart from the Rules, is one of long standing and general acceptance as may be seen from the following authorities:

"It is a power at common law, and by the ancient practice of the Court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of Court, and has been uniformly exercised, unless the delay is imputable to the laches of the party applying": per Lord Denman in *Evans v. Rees* (1840), 12 Ad. & El. 167 at 175, 113 E.R. 774, in respect of the power of the Court to enter judgment *nunc pro tunc*. This principle was applied in *Neil v. McMillan* (1868), 27 U.C. Q.B. 257, a case in which the plaintiff obtained a verdict on 22nd March 1866, and died on 26th June, having in the previous April assigned the verdict to one C. In May the defendant had applied for a new trial and in September his application was dismissed. There were some further proceedings which finally were decided against the defendant. It was held in effect that C. was entitled to judgment as of 22nd March 1866.

The Judicature Act of 1881, of course, greatly simplified the old common law procedure and the Rules of Practice dealing with change of parties by death adopted the Chancery procedure: MacLennan's Judicature Act, 2nd ed. 1894, p. 487. Nevertheless the power of the Court to prevent prejudice to any of the parties which may be caused as the result of the reservation of judgment by the Court continues, and in my view that is the real basis upon which Moss J.A. pronounced his judgment in *Gunn v. Harper et al.*

This power has been exercised by the Supreme Court of Canada in *Robertson et al. v. Wigle* (1888), 15 S.C.R. 214. In that case an appeal was taken from the Maritime Court of Ontario to the Supreme Court of Canada. Rule 269 of the lower Court required a notice of appeal from a decision of that Court to the Supreme Court of Canada to be given within 15 days from the pronouncing of the decision. A judgment was handed by the Surrogate to the Registrar, but not in open Court, on 31st August, and was not drawn up and entered by the Registrar for some time. Ritchie C.J., at p. 216, said:



“As there was no judgment delivered in open court on August 31, 1887, I am not prepared to differ from the opinion that the time would not run until entry of the judgment on September 15, 1887, and therefore the appeal is properly before this court.”

In many of the early decisions the question whether a judgment is effective from the date upon which it is pronounced or from the date on which it is entered comes up for consideration. The English Rules, of course, cover the point but in the present case it is unnecessary to consider the question of the significance of entering the judgment. It may be noted in passing, however, that under the practice at Osgoode Hall when, under the Rules of Practice, judgments are settled here they are settled before the Registrar and then, upon being signed by him, are almost invariably taken to the office of the entry clerk in the same building, where they are left for entry in the judgment-book, and then they are returned to the party having the carriage of the judgment, either later the same day or on the following day. Mention is made of this simply because of the practice in England as described in *Turner v. London and South-Western Railway Company*, *supra*. But it may also be noted that the present practice in Ontario is very similar to the Chancery practice described in Daniell's Chancery Practice, 5th ed. 1871, pp. 869, 877.

In the case of *Couture v. Bouchard* (1892), 21 S.C.R. 281, an action was brought by the respondent against the appellant for \$2,006, and was argued and taken *en délibéré* by the Superior Court sitting in review on the 30th September 1891, the day on which the Act 54 & 55 Vict., c. 25, s. 3, giving a right to appeal from the Superior Court in review to the Supreme Court of Canada, was sanctioned. Judgment was rendered a month later in favour of the respondent. On appeal to the Supreme Court of Canada it was held that the respondent's right could not be prejudiced by the delay of the Court in rendering judgment, which should be treated as having been given on 30th September when the case was taken *en délibéré*, and therefore the case was not appealable. Taschereau J., at p. 285, referred to several authorities in support of the principle, including *Evans v. Rees*, *supra*.

In the present case, as already stated, the parties desire to have the judgment bear date the 2nd February 1949, the day

upon which it was delivered. The defendant's executors obtained letters probate on 24th March 1949, and on the following day, upon the plaintiff's application, the order to proceed was made against them. The defect in the action caused by the defendant's death was removed by the order to proceed and an appeal from the judgment at the trial has been taken upon the assumption that the formal and effective date of the judgment was 2nd February 1949. If it were now held that the formal judgment should be dated the last day of the argument at the trial, namely, 10th December 1948, the plaintiff would have to make an application to extend the time for appealing and he would probably have to serve a new notice of appeal. To this extent at least he would be prejudiced by dating back the formal judgment.

In my view the action has been fully constituted to proceed since the order of 25th March 1949, and, there being no prejudice to any of the parties, the provisions of Rule 513 should prevail. The formal judgment should therefore bear date the 2nd February 1949.

*Order accordingly.*

*Solicitor for the plaintiff: Wm. C. Cuttell, Toronto.*

*Solicitors for the defendant: Slaght, Ferguson, Boland & Slaght, Toronto.*

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[GALE J.]

**Re The International Nickel Company of Canada, Limited.  
Shedden v. Kopinak.**

*Labour Law—Trade Unions—Existence of Unincorporated Union as Legal Entity apart from Individual Members—Withdrawal of Local from International—Insufficiency of Mere Majority Vote—Right to Funds.*

The effect of recent legislation in Ontario as to labour relations is that an unincorporated trade union has now acquired a statutory identity, and is a legal entity, separate and apart from the individual members who compose it, and may be a party to a contract, such as a collective bargaining agreement with an employer. *In re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1*, [1947] 2 W.W.R. 510; *Vancouver Machinery Depot Limited et al. v. United Steelworkers of America et al.*, [1948] 2 W.W.R. 325, agreed with.

Although the general rule is that in the conduct of the affairs of an unincorporated group or association the will of the majority shall prevail, that rule does not apply where the group or association is going outside its powers by seeking to bring its existence to an end or to sever the cord through which it derives its being, *e.g.*, where a local of an international trade union seeks to withdraw from its affiliation with the international body. In such cases there must be practical unanimity.

TRIAL of an issue, directed on an application for directions under s. 59 of The Trustee Act, R.S.O. 1937, c. 165.

7th and 8th June and 12th to 15th September 1949. The issue was tried by GALE J. without a jury at Toronto.

*T. D. Delamere, K.C.*, and *G. M. Huycke, K.C.*, for The International Nickel Company of Canada, Limited, applicant.

*F. A. Brewin, K.C.*, and *J. H. Osler*, for the plaintiffs.

*C. L. Dubin*, for the defendants.

*A. H. Hollingworth*, appointed by the Court, for other employees.

15th September 1949. GALE J. (orally):—I am sitting to-day, and have been throughout the several days of the trial of this issue, in an attempt to determine who is entitled to a rather large amount of money which has been accumulated by The International Nickel Company of Canada, Limited under the provisions of a collective bargaining agreement which will be referred to at greater length hereafter. Before stating my decision I think it might be useful for me to outline the facts as I recall them.

We are concerned with what has taken place at the Port Colborne plant of the company. Some time prior to the early part of 1943 the hourly-paid employees, as I understand it, had formed themselves into a group known as the Port Colborne



Refinery Workers' Union. In the early part of 1943 they were persuaded to apply for a charter with the International Union of Mine, Mill and Smelter Workers, and accordingly made application for a charter in the form which is included in ex. 1, being the 1942 constitution of the International Union.

Mr. Shedden, who is a party to these proceedings, was one of the signers of that application. It is to be observed that it is an application by individuals who have become members of an international union for a local charter with certain jurisdictional authority. Later I shall be referring in more detail to that application.

Ultimately the application met with success and a charter was granted to those who applied. As I understand it, the Local to which the charter was granted then became known as the Port Colborne Refinery Workers' Union, Local 637 of the International Union of Mine, Mill and Smelter Workers, C.I.O. Following receipt of the charter under that name application was made to the Labour Court of Ontario, which was then in existence, and by order of that Court dated the 27th September 1943, Local 637, International Union of Mine, Mill and Smelter Workers was declared to represent a majority of the employees of the company and was certified as the collective bargaining agency for those employees. The Local, as bargaining agency for the employees, then negotiated for and secured a collective bargaining agreement, which was renewed from time to time until the 1st June 1948. This will be mentioned more specifically at a later point.

Perhaps, however, I should interject a word to the effect that while the constitution of the International Union in effect in 1943 contained no specific provision pertaining to the withdrawal of any particular local, the constitution was changed in 1947 by having added to it a new provision which is to be found in ex. 17 as s. 4 of art. 25. That was a new section providing that a local union should not withdraw from the International Union, or dissolve, so long as at least ten members in good standing objected thereto, and in any event not until certain procedural steps were taken.

I have said that the amendment was made to the constitution, but something further should be said about the manner in which it was adopted. In accordance with the constitution of the International Union the amendment was passed upon by the

constitutional committee attending the 1947 convention, and was then introduced on the floor of the convention. Mr. Shedden, who was then president of Local 637 and a delegate to the convention, was a member of the constitutional committee, and admitted that the unanimous report made by the committee to the convention favoured the amendment. Subsequently, and still in conformity with the provisions of the constitution, a referendum vote was held of all members of the International Union, with the result that the amendment passed by an over-all vote of 25,214 in favour and 12,757 against, the result of the vote at Local 637 being 189 in favour of the amendment and 106 against it.

Some time during the fall of 1947 or the spring of 1948 those who were then members of the executive of Local 637 fell out of harmony with the expressed policy of the International Union, which also differed from that of the Canadian Congress of Labour.

At this point I should say something about my understanding of the ramifications of these various organizations. An employee of the Port Colborne plant of The International Nickel Company of Canada, Limited, who signed an application for membership in the International Union of Mine, Mill and Smelter Workers thereupon became a member of that body. I shall say something more about his relations with the Local at a later stage. The International Union of Mine, Mill and Smelter Workers is, in the United States, affiliated with the Congress of Industrial Organizations. I do not know, indeed there was no evidence on the point, just what is involved in that affiliation, but it has been stated that an international union affiliated with the Congress of Industrial Organizations can in some way exercise its right to withdraw from it at any time.

In the same way, the International Union of Mine, Mill and Smelter Workers was, in Canada, affiliated with the Canadian Congress of Labour, which appears to be the counterpart in our Dominion of the Congress of Industrial Organizations. It is my impression, too, that one who is a member of the International Union of Mine, Mill and Smelter Workers cannot at the same time be a direct member of the Canadian Congress of Labour, and also that while the Canadian Congress of Labour will grant direct charters to employees in Canada it will do so if those

employees at that time are members of any other national or international group.

In this instance, as I have perhaps already said, the International Union of Mine, Mill and Smelter Workers was affiliated with the Canadian Congress of Labour until its first suspension in August 1948, but, as I have also said, fundamental and deep differences in the views and policies of the two parent bodies developed during the latter part of 1947 and came into full force in 1948. The executive of Local 637 adopted, or shared, or at least supported, the opinions expressed by the Canadian Congress of Labour in opposition to those voiced by the International Union of Mine, Mill and Smelter Workers, and indeed the executive gave further tangible recognition of the conflict of ideologies by acting in such a manner as to effect a deferment of payment of the *per capita* dues to which the International Union of Mine, Mill and Smelter Workers was entitled in May 1948. Mr. Shedden, in his evidence, indicated that the executive was not at that time siding with the Canadian Congress of Labour, but I cannot accept that suggestion in the light of the other testimony.

The next event of importance was the coming into existence of a collective bargaining agreement dated the 1st June 1948, which was to be for a term of one year. That agreement is filed as ex. 6, and is between The International Nickel Company of Canada, Limited, therein called "the Company", of the first part, and "Local 637, International Union of Mine, Mill and Smelter Workers", therein called "the Union", of the second part. It contains, among many other things, that which has been popularly designated as "the Rand formula", requiring the company to deduct from the wages of each employee in the bargaining unit the monthly sum of \$1.50, and to remit the sum so collected each month, prior to the tenth day of the month next following, to "the Financial Secretary of the Union". I think I have already mentioned that in August 1948 the antagonism between the Canadian Congress of Labour and the International Union of Mine, Mill and Smelter Workers had reached such a pitch that the latter was suspended from its affiliation with the former.

In point of time the next event of any consequence is a further amendment by the International Union of Mine, Mill and Smelter Workers of its constitution, in September 1948. That amendment is to be found in the front of ex. 18, and has the effect



of amending the form of application for charter and the form of charter itself, by making provision for the event of the withdrawal of a local pursuant to art. 25 as it then stood.

Pursuant to the terms of the collective bargaining agreement of 1st June 1948, the company regularly checked off the funds and remitted the same for the months preceding October, and indeed forwarded, on or before 10th October, the accumulation made in September. The struggle between the two parent organizations, if I may term them that, did not go unnoticed by the Local, and on 12th October 1948 the executive, who were entirely in sympathy with the concepts expressed by the Canadian Congress of Labour, passed a resolution in which they agreed to recommend to the membership of the Local that a vote be taken to determine the destiny of the Local. That is to be found in the minute-book of the Local, ex. 8. The resolution is "that the executive recommend to membership that a referendum vote be held to determine the feeling of members towards withdrawing from the Mine, Mill and seeking re-affiliation with the C.C.L." The ballot on this question was to take this recommended form:

"Do you favour Local 637 withdrawing from I.U.M.M. & S.W. and affiliating directly with the Canadian Congress of Labour or a jurisdiction designated by the Congress for Mine, Mill and Smelter Unions as suitable?"

The minute of that meeting of the executive does not record the vote on that motion, but I assumed it was put and passed, and the evidence seems to bear that out. At all events, there apparently was a meeting of the membership of the Local on 14th October 1948, at which there were present 33 persons, as I find upon the evidence of Mr. Cowper. It was moved, seconded and carried "that the recommendation of our executive be adopted", and there then followed an explanation in detail by Mr. Shedden of the reasons for the proposal of the executive. It was also moved, seconded and carried on that occasion that Mr. Peart be asked to conduct a referendum vote and there was also passed a collateral motion setting up machinery for the conduct of the vote. The motion which adopted the recommendation for the referendum vote was supported by 21 of those present, 8 others refraining from voting on the ground, as Mr. Cowper stated, that the move was quite unconstitutional.

Notices for the vote were posted and subsequently, through a meeting of Mr. Cowper and others who shared his views, the officers of the International Union were advised of it. It is perhaps not without significance that no official or formal communication of the manoeuvre was forwarded by the executive of the Local to the International Union.

After hearing of this impending event, Mr. Carlin, Mr. Breton and other representatives of the International Union appeared at Port Colborne and, following discussion with those who did not wish to secede from the International Union, they decided to participate in the campaign which preceded the vote, by urging upon all employees that the result should be in favour of loyalty to the International Union.

Mr. Carlin is the international board member for District 8, which in part includes the entire Province of Ontario, and as such is the ranking officer of the Union in this territory. He was empowered by the International Union to investigate the matter by letter, filed here as ex. 33.

Despite evidence, or perhaps suggestions, to the contrary, I am thoroughly satisfied that Mr. Carlin made it quite clear to Mr. Shedden and others acting in concert with him that in his view the vote was *ultra vires* and could have no legal effect. Mr. Shedden, however, took the stand that it was the will of the members and the vote would proceed regardless of its status, and, appreciating that they could not forestall the vote, Mr. Carlin, Mr. Cowper, and others who sided with them, decided to engage in the struggle for the purpose of ascertaining the number of those who were opposed to the move; they took care not to admit that it was of any legal consequence.

At the poll, which incidentally was restricted to those who were members of the International Union on the 19th October, as distinct from other votes in which anyone who signed an application card, even immediately before voting, was allowed to cast a vote, there were 624 affirmative votes and 457 negative votes. Thereafter Mr. Carlin demanded from Mr. Shedden the keys and effects of the Local, but achieved nothing.

Following the vote, Mr. Shedden and his associates called a meeting for 28th October, at which time the report on the referendum vote was accepted and filed and the executive were commended for the impartial and efficient manner in which the

vote had been carried out. It was then moved and carried unanimously by those present on that occasion that the meeting "express full confidence in our executive to go forward to a satisfactory affiliation for our Union".

In the minutes of the second meeting on the same day, which is termed the midnight meeting, and at which I am not sure there were in attendance those who had already attended the prior meeting, it is stated: "Report on referendum vote and contacts with C.C.L. said we could get charter from them. Report on evening meeting and minutes of meeting read." The meeting was apparently addressed by Mr. Sefton, who stated that "Mine, Mill had not done the job it should" and suggested that the Local "swing into the Steelworkers".

It is to be observed that, at that meeting at any rate, there was no resolution for withdrawal from the International Union of Mine, Mill and Smelter Workers, although all the discussion, and it cannot be termed any more than that, would indicate that those present intended that action.

Another meeting was held by this group, if I may call it such, on 4th November at 8 p.m., and a further one at 12.20 a.m. on 5th November. It was moved and carried unanimously that "the officers of the Port Colborne Refinery Workers' Union be authorized to ask for a charter from the United Steelworkers of America, C.C.L.-C.I.O. and the officers be ordered to take all necessary steps to keep the Port Colborne Refinery Workers' Union as the bargaining agent in" the plant. At the midnight meeting it was also carried by the 28 members recorded as being present that the meeting endorse the action taken at the earlier meeting "in instructing the Executive to obtain a charter from U.S.W.A.".

It is to be noticed again that at neither of those two meetings, regardless of how those present may be described, was there a motion to withdraw or take steps from the International Union of Mine, Mill and Smelter Workers. On the same date a letter was despatched from Mr. Shedden to Mr. Travis, the secretary of the International Union, which letter is ex. 2. In it Mr. Shedden advises the International Union that the Local "has withdrawn from its affiliation with the International Union of Mine, Mill and Smelter Workers". He also enclosed a cheque representing the *per capita* dues to the end of September and stated that further



funds would be remitted when the next payment was received from the company, and also that the charter was being sent under separate cover. The charter apparently was mailed but for some reason, which was not explained, it never reached its proper destination in Chicago. Ultimately, as will be mentioned later, a duplicate of that charter was returned to Port Colborne.

On or about the same date Mr. Shedden or one of his followers was advised that a number for a local charter in the United Steelworkers of America had been reserved, but despite publicity to the effect that the group had become a local of that international union it would appear that no charter was ever issued. Perhaps some point can also be made of the fact that, notwithstanding the form of the question voted on, the Canadian Congress of Labour did not designate the United Steelworkers of America as an appropriate affiliation. Moneys of the Local were despatched about this time to the Port Colborne Co-operative Society and to the Porcupine Miners' Union at Timmins for organizational purposes, but nothing turns on that activity in the determination of the matter before me.

On 23rd November, at what is termed a "membership meeting" (without describing what the word "membership" embraces), the group sharing Mr. Shedden's views purported to "confirm" the former executive "under the new charter", which I assume would be the expected charter from the United Steelworkers of America, but in order that their former executive might comply with the requirements of the regulations of the United Steelworkers of America another trustee was added, and it would appear from the minute-book, ex. 8, that the persons who were participating in the incidents I have just outlined were doing so in the belief that they were members of the United Steelworkers of America and had been granted a charter by that organization.

Subsequently, on the 25th January 1949, they purported to withdraw from the United Steelworkers of America and release the latter from any obligations or undertakings to issue a charter to their group (which in the same resolution was described as a Local of the United Steelworkers), and to "instruct the Executive to apply to and accept from the Canadian Congress of Labour a Charter as a Local thereof and to take all necessary steps to carry out the transfer of affiliation and in particular to

transfer to the local when chartered by the Canadian Congress of Labour, all property and assets of the local”.

Thereafter any cards which had been signed by employees by way of application for membership in the United Steelworkers of America were destroyed, and new application cards for membership in the Canadian Congress of Labour were signed by Mr. Shedden and at least nine others, who thereupon applied for a charter of a local of the Canadian Congress of Labour within the contemplation of the terms of its constitution. Such a charter was granted and in ex. 8 there appears a minute for 8th February 1949 for what is described as a “C.C.L. Meeting”, and in that minute it is recorded that the officers were present, although I cannot find any record of the election or appointment of any persons as officers of the Canadian Congress of Labour local. It is true, however, that Mr. Smith, in giving evidence in reply, described himself as president of that organization, and a statement was made, I believe by counsel, that on some date after the first part of the trial of this issue an election of officers for that local union was held.

In March, I believe, the local of the Canadian Congress of Labour, to which reference has just been made, filed an application under The Labour Relations Act, 1948 (Ont.), c. 51, for certification as the bargaining agent for the Port Colborne employees of The International Nickel Company of Canada, Limited, and that application was subsequently rejected.

Turning now for the moment to the activities of those who did not follow the lead of Mr. Shedden and the old executive, the evidence discloses that on 19th October, pursuant to what he thought was granted to him by way of sufficient authority, Mr. Carlin called a membership meeting of Local 637—in fact, two meetings were held that day, following the two shifts, and they were attended by a relatively large number of employees. Those who attended on that date passed a motion of want of confidence in the former executive, and at the next meeting, held on 25th October, it was proposed that a planning committee be set up to secure signatures for a petition which would have the effect of removing the former executive from their offices. On 27th October a temporary executive committee was elected in place of Mr. Shedden and the executive of which he was a member. It should be pointed out that if the members attending the meetings

to which I am now referring were preserving the identity of a local of the International Union of Mine, Mill and Smelter Workers, they could not replace the former executive under the constitution until such executive had been ousted by the procedure laid down in the constitution. That procedure was properly initiated and subsequently Mr. Breton was appointed administrator of Local 637 under enabling powers contained in the constitution. His authority is filed here as ex. 37, and he did carry out his administration until 27th January, when the group elected a new executive board, being then entitled to do so since the former board had been properly removed by expulsion proceedings. Those permanent officers are named in ex. 40, and if I correctly understand the situation they are still to-day the officers of the group represented by Mr. Kopinak.

Prior to 27th January, and certainly after that date, that group held regular and special meetings and endeavoured to function in all respects as the Local of the International Union of Mine, Mill and Smelter Workers. They also had their members sign new membership application cards, for the reason that although requests had been made for delivery of the union records they had not been forthcoming from Mr. Shedden.

I should also mention that in January 1949 the International Union, which had in the meantime been reinstated as an affiliate of the Canadian Congress of Labour, was again suspended, and this suspension still stands.

About this time a duplicate of the original charter issued to Local 637 was despatched from Chicago to the new executive mentioned in ex. 40.

In March 1949 the Kopinak group attempted to open negotiations for a new contract with the company under the provisions of the old contract, or perhaps under the statute, but quite logically the company took the position that it could not engage in those negotiations in the circumstances which then existed.

While perhaps it is not of any great importance, I should also say that throughout this period of trouble and uncertainty the international officers of the International Union of Mine, Mill and Smelter Workers steadfastly recognized the continuity of existence of Mr. Kopinak's group as its Local 637. That is probably all I need say about the activities of that group.



Let us now look at the position of the company. It obviously found itself in grave difficulties following receipt of the communications from the warring factions, and quite properly it immediately took an attitude of neutrality. For one thing, it ceased to remit the dues checked off pursuant to art. 5 of the collective bargaining agreement, being in undeniable doubt as to who should receive those moneys. It continued to collect the dues pursuant to the contract until the end of its term, and now has in its possession some \$15,996, less \$94.25, being the cost of evidence which I ordered to be transcribed, or a net amount of \$15,901.75.

Mention should also be made of the fact that there is uncontroverted evidence that in this period of strife the collective bargaining agreement was carried out as far as it was possible to do so. The company recognized the stewards regardless of which side any one of them might represent, and substantially the employees at least received full benefit from the contract. If anyone has a right to object about the failure of performance it would be the company, because during this period it had no one in authority with whom it could deal. However, no complaint has been made by it, so that I am not concerned with that feature of the matter.

The sole exceptions to the normal functioning of the contract were: (1) the impossibility of the company paying over the dues it collected; (2) its decision that neither faction should have resort to the bulletin boards for the posting of notices; and (3) some interference at one of the later stages with the grievance procedure contemplated by the agreement. As I understand it, the contract was performed in all other respects.

I think those are the salient facts which give rise to the dispute and problem which I now have to solve.

The company, when it became satisfied that there was not going to be an immediate end to the hostilities, and finding itself in the position of a trustee with moneys for which it could not appoint a destination, came to the Court for advice and direction. The proceedings in court have not been as expeditious or as simple as might have been anticipated when they were launched, but at least this will be a temporary end to them. By reason of the questions which were asked the parties were required to go to the Ontario Labour Relations Board and then, having regard

to the answer secured there, I directed that the matter should not be resolved without the formalities and comfort of a trial upon *viva voce* evidence.

The questions now before me, sitting on the adjourned motion and on the issue, after it has been declared that the document ex. 6 is a collective bargaining agreement, are three in number:

“(a) Which, if either, of the said groups at any material date between October 22, 1948, and the date of the trial of this issue, was a party to the Collective Bargaining Agreement dated June 4, 1948, effective June 1, 1948, and made between The International Nickel Company of Canada, Limited, and Local 637, International Union of Mine, Mill and Smelter Workers?

“(b) Who, at any material date between October 22, 1948, and the date of the trial of this issue, were the officers of the party to the said Agreement referred to therein as ‘the Union’ and who were entitled to act on behalf of ‘the Union’?

“(c) Who, at any material date between October 22, 1948, and the date of the trial of this issue, was entitled to the sums of money which have been deducted by The International Nickel Company of Canada, Limited from the first pay cheque due in each calendar month to each hourly paid employee of the Company pursuant to the terms of the said Collective Bargaining Agreement and which have not been paid over by the said Company to the Financial Secretary of ‘the Union’ prior to the 22nd day of October, 1948?”

Counsel agree that there is now no necessity to answer question (b), and no useful purpose could be served by doing so. That question was quite properly put by the company in the hope that it would be answered while ex. 6 was current and would thereby afford direction to it in carrying out the provisions of that contract. At this date the collective bargaining agreement, ex. 6, is no longer in effect and there is therefore no point in attempting to name the officers of the party to the agreement from and after 22nd October 1948. As I said at the outset, I say so, would give extreme difficulty regardless of what may be the answers to the other two questions.

Referring to question (a), it is my conclusion, about which I may say I have no real misgiving, that those represented by Mr. Kopinak constitute, and have always constituted, Local 637

of the International Union of Mine, Mill and Smelter Workers and were the group which was a party to the agreement, ex. 6, from and after 22nd October 1948. As I said at the outset, I could dwell at great length upon my reasons for coming to that view. What I intend to do now is simply to state shortly what impels me to that decision.

I agree with the argument presented by Mr. Dubin that by reason of our legislation respecting labour relations a local union chartered by an international union has recently acquired a statutory identity. The two British Columbia cases, *In re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1*, [1947] 2 W.W.R. 510, [1947] 4 D.L.R. 159, and *Vancouver Machinery Depot Limited et al. v. United Steelworkers of America et al.*, [1948] 2 W.W.R. 325, [1948] 4 D.L.R. 518, have been examined and thoroughly considered by counsel and myself during the course of their excellent argument, and I see no occasion whatever to deviate from the basic reasoning which is essential to the judgments of the Court of Appeal of British Columbia in those cases, to the effect that under similar legislation local unions have now acquired, through statute, rights, immunities and powers, and by the same token have had cast upon them by legislation duties and obligations, to such an extent as to clothe them with a legal status which is distinct from that of their constituent members. The judgment of Mr. Justice O'Halloran, for whom this Court has the greatest respect, in the *Patterson* case, is irresistible on the point. I also point to the unequivocal statement of Mr. Justice Robertson in the same case, where he says: "In my opinion the Act in question mentioned in the complaint has constituted a union, a *persona juridica*."

Mr. Osler endeavoured to distinguish those authorities, and to exclude their applicability in Ontario, by pointing out that while in British Columbia the statute similar to our Labour Relations Act is subsequent in point of time to the counterpart of our Rights of Labour Act, 1944 (Ont.), c. 54, so as to enable the Court in that Province to say that The Labour Relations Act had impliedly confirmed the right of unions to sue and their liability to be sued, in Ontario the reverse prevails, and that by reason of the amendments to The Rights of Labour Act by 1949, c. 95, s. 13, no action can be taken by or against a union in Ontario, with the result that the *ratio* of those cases is not



applicable here. With respect, I do not think that this difference affects the fundamental consideration underlying the judgments in the two British Columbia cases. The quality of being able to sue or to be sued is only one of the ingredients mentioned by the Court in those cases as indicating the creation of this new juridical person. Those judgments make it abundantly clear that, because of other features implicit in the legislation, unions have acquired a statutory existence hitherto not recognized in law except in England, where registered trade-unions are acknowledged. The Court there intended to confirm the new status of local unions because of several new attributes, including the right to sue and be sued, now granted by statute, and merely because our authorities have eliminated the capacity to sue and be sued it does not follow that this new creature must be repudiated.

If it is true that a local union has acquired a status which is distinguishable from any that may exist through its mass of members, then, because of the legislation in force on the 1st June 1948 and the wording of the collective bargaining agreement itself, it is manifest that Local 637 of the International Union of Mine, Mill and Smelter Workers, as distinct from those who had joined the Local, was the party to that contract and entitled to the property, rights and other benefits emanating therefrom. It follows too that the local union could be identified only by reference to the charter which was issued to it and the rules and regulations which governed it.

Viewing the matter in that light it becomes clear that since the Local, and not its membership, was the party certified as the collective bargaining agency under the then existing legislation, and was the party to the agreement, it is entitled to continue as such while composed of persons empowered to carry out the enterprise pursuant to the constitution, rules and regulations of the International Union of Mine, Mill and Smelter Workers.

As I see it, no matter whom Mr. Shedden represents, and no matter for whom Mr. Brewin and Mr. Osler appear, those employees could not conceivably be deemed to constitute a party to the collective bargaining agreement. That is recognized, indeed, by Mr. Shedden's group, because they applied for certification in the spring of this year well knowing, as Mr. Shedden

admitted, that if they were already a party to the agreement they were disqualified from applying for certification. Not only are they disentitled from applying by law, but also on the dictates of common sense, since it stands to reason that if they were already a party to the agreement no purpose could be served by such an application. I repeat, therefore, that regardless of what may be said against Mr. Kopinak and his band, it is plain that Mr. Shedden and his associates were never parties to the collective bargaining agreement in the period that I am discussing.

What, then, is the position of Mr. Kopinak's group? It seems to me that the evidence unequivocally establishes that what was done by Mr. Cowper and those sharing his opinions had the effect of continuing the existence of Local 637 as a local of the International Union of Mine, Mill and Smelter Workers, and of installing themselves properly and legally as the officers of that local in the place of Mr. Shedden and the former board. The steps taken to that end are not questioned by Mr. Brewin, who simply says that they are no concern of his. The evidence demonstrates that the present executive, headed by Mr. Kopinak, is the duly-elected executive of the Local, which is the collective bargaining agency certified by the Court and the party to the agreement.

Mr. Shedden and those who voted with him on 22nd October, and who subsequently left the International Union of Mine, Mill and Smelter Workers (which I take to be a consequence of their signing applications for and being accepted in other unions), did so as individual members and not, in my opinion, as a body which could be recognized by this Court. Perhaps that is all I need to say on that point, though many other features could be mentioned. For example, there was no formal motion of withdrawal as such; the vote which was taken left three alternatives, and while undoubtedly severance seems to have been the course that these men were pursuing, there is nothing in the minutes or before the Court that definitely and decisively indicates that the majority of the members of Local 637 were actually effectuating a withdrawal. The vote merely constituted an expression of opinion and thereafter some of the employees, who had been members of the International Union of Mine, Mill and Smelter Workers, became associated with other organizations. I think

I need not further develop my conclusions on that particular aspect of the matter.

Mr. Brewin's most persuasive and able argument approached the problem from a different direction. He argued that each member of the Local had two personalities, one as a member of the Local, which was the bargaining representative for the employees, and the other as a member of the international body. I am not prepared to pass on that. Frankly, I found some difficulty in understanding all of its ramifications, and I certainly do not intend to pursue them for the purpose of examining the truth or fallacy of the proposition.

But even if that be true, we go on to the next contention put forward by Mr. Brewin, and it is that those who are members of a local bargaining representative can, by the will of a mere majority, withdraw from the responsibilities involved in their association with the international union, and at the same time take with them any property or benefits flowing from that relationship. He cited, in support of that part of his argument, a simple statement from Halsbury to the effect that in conducting the affairs of an unincorporated body the will of the majority is to prevail, a proposition which was also expressed by the late Mr. Justice Gillanders in *Glass Bottle Blowers' Association v. Dominion Glass Company Limited*, [1943] O.W.N. 652. Another decision also relied on by him was that of *International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO et al. v. Becherer et al.* (1948), 61 A. 2d 16. With respect, those authorities do not carry Mr. Brewin as far as he would like to go.

While it is true that in all internal affairs, that is, in action taken within the boundaries of the rules and regulations which govern the conduct of an association, and always subject to those rules and regulations, a majority of the members can control and guide the fate of the minority under the authorities, that principle does not apply where the group or association is going outside of its powers by seeking to bring an end to its existence or to sever the cord through which it derives its being. Attempts of that sort are to be found in *Vick v. Toivonen* (1913), 4 O.W.N. 1542, 24 O.W.R. 802, 12 D.L.R. 299, and *Equity Lodge No. 11, Provincial Workmen's Association et al. v. McDonald et al.* (1910), 8 E.L.R. 421, which indicate that in the absence of some provi-



sion to the contrary, for an association such as was there dealt with, and such as that with which I seem to be concerned, the entire membership must be in favour of the move before it can be validly enforced. It is not to be overlooked that in the *Becherer* case, relied upon by Mr. Brewin, there was in effect universal support for the change of affiliation, and also that the judgment there seems to misconceive the applicability of other cases of a similar character. See *Forler v. Brenner* (1922), 21 O.W.N. 489, and *Wirta v. Vick* (1914), 6 O.W.N. 599.

In my view, therefore, Mr. Brewin's argument collapses at that point. But even if it were tenable so far, it would not go to the next stage. He proceeds with the assertion that since a local can withdraw by a majority vote that was effectively done here, notwithstanding the provisions of art. 25, s. 4, of the constitution, enacted at the 1947 convention. His theory is that the amendment could not disturb the contractual rights existing between the International Union and the Local, as embraced in the application and charter, without acquiescence or agreement on the part of the Local, and that there was none here. He urges that the contract between these two organizations contemplates a clear and unlimited right of withdrawal, and reasons that before that term could be altered there would have to be shown consent on the part of the Local. In answer, however, there is considerable foundation for thinking that there is no contractual relationship between the Local and the International, or, if there is, that it does not arise through the application and charter. A good deal of discussion took place between counsel and myself as to just what relations did exist between employees, Locals, Internationals and other organizations with which affiliation might be made. In one sense an employee is a member of a Local and also a member of the International. Viewing it from another angle, he is a member of the International only. I think perhaps the latter inference is the more correct one. As far as Locals are concerned, at times they seem to be something quite distinct and severable from the International, and on other occasions or for other purposes they seem to be part and parcel of the International. Turning to the International, in some respects it seems to be composed only of the individuals who have become members, and in other aspects it seems to consist of the Locals to which charters have

been granted. I repeat that whatever may be the rights, contractual or otherwise, between the International and the Local, it is hard to believe that the Local was the entity which acquired rights under the application for the charter and the charter itself.

In the first place, the application is signed by members of the International Union; the Local is not a party to that document. Then again, the charter is apparently granted, not to the Local, but to the individuals who have applied. There is no direct evidence on the question what form this particular charter took, it being suggested on the one hand that the names of the individual applicants were set out in it, and on the other hand that in some mysterious way the name of the Local was inserted in the first blank to be found in the form of charter on p. 4 of ex. 1. It is difficult to accept the alternative in view of the wording of the charter issued by the Canadian Congress of Labour and filed as ex. 48, and the language of the model charter itself, which clearly contemplates that it is being given to persons to be held by "Them and Their Successors". If that is true, then the Local could not be a party to the agreement with the international body and therefore, unless property rights were produced and thereafter expressly transferred to Mr. Shedden and his followers, either by the application and charter or otherwise, the entire membership of the Local was bound by the terms of the charter to accept any amendments properly and lawfully made to the constitution.

As I have already said, there is only a faint suggestion here that s. 4 of art. 25 was not duly enacted by the procedure which was adopted in 1947. Moreover, there is the fact that the Local, by a majority vote, approved of the proposed amendment, and it appeals to me that it is not now open to the Shedden faction to argue that the Local was not bound by that amendment. Mr. Brewin countered with the suggestion that the vote was a vote of the international organization and not a vote of the Local, but it is to be remembered that, so far as has been made to appear, the vote was conducted under the constitution set out in ex. 16, which at the relevant time was also the constitution of the Local, and it is wrong, therefore, to think that the vote as such was an International matter and not a Local matter. In my view it involved both, and the Local cannot now be heard to say that it is not affected by that procedure.

That is all I need say on the first point, except perhaps that I do not adopt the contention that the Cowper and Kopinak circle was estopped or prevented from disputing the efficacy of the vote on 22nd October. For the reasons already given, the point is not really of importance, but lest it be thought that I am of the opinion that there is something in it, I wish to state that in my view the actions of Mr. Cowper, Mr. Carlin, Mr. Breton and their supporters could not bind the International Union to accept the constitutionality of the referendum, and I also desire to say that while participating in that vote, which after all was only for an expression of opinion, those who were contending for the negative result made it clear that they were denying the validity of the manoeuvre. I think Mr. Carlin was mistaken when he said he thought that his press release was displayed in the Port Colborne paper before the vote, for it was subsequently proved to have appeared there the day after, but I have no doubt that the substance of that statement to the press was voiced by him and others in several other ways before the ballots were cast, so that it must have been well known that they were not tacitly admitting the regularity of the vote.

Mr. Hollingworth represents those employees of the company who at no time after 1st October have been members of any of these organizations. His contention on behalf of those persons is that there should be declared a resulting trust with respect to the moneys collected from those for whom he appears, and that an order should issue for the return of those moneys to the individuals entitled. He bases his contention on two theories, first that there is such a absence of performance under the collective bargaining agreement as to amount to want of consideration, entitling his people to the return of the moneys, or secondly that because of uncertainty the contract became voidable, with a similar resulting right of reimbursement.

With all due deference, I do not think there is anything in either contention. To begin with, there is no evidence of such a lack of performance of the contract as would justify the conclusion that there was a failure of consideration for these men. It was demonstrated to my satisfaction that the contract was carried out in all respects save three.

The first of these was the inability of the company to forward the dues which it checked off in the period with which we are



concerned. As to that, the employees were certainly not the ones to suffer. Mr. Hollingworth invited me to find that the Rand formula was invoked in this instance for the very reasons stated by Mr. Justice Rand when propounding it, including the modern desire to promote and maintain strong unions and the equitable principle that all employees who receive benefits from that strength should be required to contribute to the cost of providing it. Mr. Hollingworth says that by reason of the struggle which developed in this plant the moneys which were paid by his clients could not be regarded as contributing to the strength of their bargaining representative, and that such representation was actually weakened financially during the period. The short answer to that is that there is no evidence of such a result. Indeed, as I said during the course of the argument, all the evidence would point to an increase in energy during the contest. Both of the contending factions exhibited vigour and aggressiveness, and the efforts which they put forward were not those of ailing organizations.

The next departure from the contract was in respect of the bulletin boards, the use of which was denied by the company to both sides. It would require considerable imagination to come to the conclusion that such loss of use was a disadvantage to Mr. Hollingworth's clients, in view of the evidence that thereafter, instead of resorting to the bulletin boards, the contestants, in publicizing any meetings or other events, handed to all of the employees written notices of such meetings or events. If anything, that change was to the benefit of the employees, including Mr. Hollingworth's group.

The other variation which must be considered is the one concerning grievances. At some later stage in the grievance procedure it is provided that the company is to supply certain forms to "the Union". The company conscientiously recognized grievances from stewards who had been in office before the deadlock came, and honoured grievances no matter which stewards presented them until the grievances reached the stage already mentioned, but then (and, in my view, wisely, in their desire to be completely neutral) its officers declined to furnish these documents, not knowing the hand which should receive them. It may be that to some small extent the employees suffered by reason of that fact, but before I could give effect to it I would have to be

sure that some inconvenience actually occurred. There is no evidence whatever that such was the case, and I decline to accede to the invitation to declare a resulting trust on what might have happened. On the contrary, there is some evidence given by Mr. Cowper, as I recall it, that on occasions, whether by agreement or inadvertently, grievances did go beyond the stage in question. There is the further thought that perhaps, by reason of the disturbance of the machinery provided by the contract for airing complaints, the company more readily corrected the supposed wrongs. Those are all matters of speculation on which I do not wish to embark. The difficulty which Mr. Hollingworth undoubtedly encountered in preparing his case, and in attempting to present evidence of occurrences such as I have in mind, is fully appreciated, but that is no reason for me to assume that the incidents took place.

There is much to be said, too, for the contention of Mr. Dubin that by reason of the provisions of our legislation and the collective bargaining agreement there is now a statutory obligation upon Mr. Hollingworth's clients to have moneys deducted, and that they cannot be relieved from that payment while any of the other parties to the contract remain in existence. Surely it would have to be shown that one of the parties to the agreement had ceased to function, or that there was a substantial failure of performance of the contract, to justify repayment to these men. Not only does the evidence here fall far short of that, but it establishes that there was almost complete performance and all employees derived almost the entire benefit to which they were entitled under the terms of the agreement.

Gentlemen, I think that is all I have to say. I answer question (a) in the manner I have indicated, namely, that the Kopinak group was Local 637 and that it was a party to the collective bargaining agreement during the period in question. I think that is all that need be said about that. The ramifications of my decision can be worked out by you later. As already mentioned, I am not answering question (b). Question (c), however, presents some problems by reason of the events which have occurred. While Local 637 of the International Union of Mine, Mill and Smelter Workers continued in existence and was a party to the agreement, in the manner I have outlined, the Kopinak group did not acquire any rights as the voice of the Local until,

perhaps, Mr. Breton was appointed administrator on 25th November 1948. It is also true that while Mr. Straith's sentiments coincided with Mr. Shedden's, and while he was notified that he could not legally act as financial secretary of the Local, in law he must be regarded as the financial secretary until Mr. Breton displaced him.

It would seem to me, therefore, that question (c) should be answered this way: Between 22nd October and 25th November 1948 sums of money which had been deducted by The International Nickel Company of Canada, Limited, pursuant to art. 5 of the contract, should have been remitted to Mr. Straith as financial secretary of Local 637 of the International Union of Mine, Mill and Smelter Workers, and in that capacity only. If he was no longer authorized to act from an internal viewpoint, then of course he would receive the moneys in trust for the Local, and would have to deliver them over immediately to the Local. In no sense would he receive them as a member of the Shedden group. A declaration may be made to that effect. Between 25th November 1948 and 27th January 1949 Mr. Breton was entitled to receive payment of any funds to be forwarded by the company. He again would receive them as administrator for the Local and would have to turn them over to the Local. From and after 27th January Mr. Riau was entitled to receive payment. I repeat that a declaration of that sort may be made, but I see no reason why the declaration should now be carried out in detail, and the order should therefore contain a provision that all of the moneys are now to be paid to Mr. Riau as the present financial secretary of the Local. It is quite unnecessary to have three different payments made when the moneys are ultimately to rest in the same place, and I think Mr. Brewin and Mr. Osler would be the first to acknowledge that.

The question of costs causes me some perplexity. The company has acted throughout in a proper, sensible and reasonable way. Through no fault of its own, it was forced to come to the Court for direction. It should have its costs of the motion and of the proceedings out of the fund. These costs will be taxed and I assume, of course, that counsel for the company will not assert that he has taken an active role in the hearing before me. Mr. Hollingworth likewise, having been appointed by the Court to represent those who were not otherwise before me, should be



paid his costs out of the fund after taxation. Mr. Dubin does not ask for costs, having regard to the result.

The only real difficulty is what to do about the costs of Mr. Shedden. I put it to both counsel before the result was known, and they both implied that perhaps since they had been brought to Court by reason of the events that occurred, they should have costs out of the fund. My conclusions can only mean, of course, that the whole dispute was improperly caused by Mr. Shedden and his followers. While the issue has not been too easy to solve, it seems to me that the former executive unreasonably embarked on their programme without first ascertaining what their position might be, and what consequences might flow from it. These proceedings are only part of the enormous problems caused by that action. It was ill-considered and wrong, and accordingly I do not think that they are entitled to costs out of this fund. The effect of an order of that kind would be that the union, from which this band decided to secede, would pay at least part of their expenses in taking that action. That would not be right. On the other hand, while something may be said for the view that the Shedden group should pay the costs of these proceedings, since they wrongfully brought about the situation that caused the litigation, I am not going to order that. I am merely going to say that there are to be no costs of the Shedden group.

Whenever I say costs I mean, of course, the costs of the motion and of the trial of this issue.

*Judgment accordingly.*

*Solicitors for The International Nickel Company of Canada, Limited, applicant: Osler, Hoskin & Harcourt, Toronto.*

*Solicitors for the plaintiff: Cameron, Weldon & Brewin, Toronto.*

*Solicitors for the defendant: Kimber & Dubin, Toronto.*

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[McRUER C.J.H.C.]

**Bawtinheimer v. Niagara Falls Bridge Commission et al.**

*Expropriation—Special Statutory Provisions—Taking of Lands to Provide Access to International Bridge—Good Faith of Minister—The Highway Improvement Act, R.S.O. 1937, c. 56, ss. 55, 57a (as enacted by 1939, c. 19, s. 4), 60—The Public Works Act, R.S.O. 1937, c. 54, ss. 8-38.*

*Constitutional Law—Validity of Legislation—Power to Expropriate Lands in Connection with International Bridge—The Highway Improvement Act, R.S.O. 1937, c. 56, s. 57a, as enacted by 1939, c. 19, s. 4—The British North America Act, 1867, ss. 91(29), 92(10).*

*Statutes—Construction—Applicability of Maxim expressio unius est exclusio alterius—Whether Complete Code Intended—Invalid Legislation—The Highway Improvement Act, R.S.O. 1937, c. 56, ss. 55, 57, 57a (as enacted by 1939, c. 19, s. 4), 60.*

Section 57a of The Highway Improvement Act, as enacted in 1939, gives the Minister of Highways power to expropriate lands in three distinct sets of circumstances, *viz.*, (a) where the Niagara Falls Bridge Commission requires land for its purposes; (b) where the Minister deems land necessary for the purposes of the Commission; and (c) where the Minister deems the land necessary to connect a bridge of the Commission, or an approach thereto, with any highway. Whatever may be the case as to the first two of these powers, the legislation in so far as it provides for the third power is *intra vires* of the Province of Ontario, since the Province clearly has power to enable the Minister to expropriate land for the purpose of constructing a highway to connect an existing highway with an international bridge. This part of the section is severable, since the Legislature would undoubtedly have conferred this power even if it had not conferred the other two. *Attorney-General for Manitoba v. Attorney-General for Canada et al.*, [1925] A.C. 561; *Toronto Corporation v. York Corporation*, [1938] A.C. 415 at 427; *Sullivan v. McGillis*, [1949] S.C.R. 201 at 211, applied.

Further, s. 57a was intended to supplement powers given to the Minister elsewhere in the Act, rather than to furnish a complete code for the expropriation of land in connection with a bridge of the Commission. The maxim *expressio unius est exclusio alterius* therefore does not apply so as to exclude the applicability of other sections of the Act to such an expropriation.

For the maxim *expressio unius est exclusio alterius* to apply to a statute, there must be a statutory expression of the intention of the Legislature by valid legislative action with reference to the subject matter. If the particular legislation is *ultra vires*, it is of no effect at all, and the general legislation remains as if the special legislation had never been passed. *Lenoir et al. v. Ritchie* (1879), 3 S.C.R. 575 at 624, applied; other authorities referred to.

Where the Minister of Highways purports to act under s. 57a of The Highway Improvement Act, his findings of fact (*viz.*, that the lands are necessary for the public purposes of Ontario or of a Department of Government) and the exercise of his power based on the facts as found by him are not reviewable by the Courts, provided he acts in good faith and his finding is based on some evidence. *Reg. v. The Commissioners for Special Purposes of the Income Tax* (1880), 21 Q.B.D. 313 at 319; *Wilson et al. v. Esquimalt and Nanaimo Railway Company*, [1922] 1 A.C. 202 at 212, applied; other authorities referred to.

AN ACTION for a declaration and other relief, fully set out in the reasons for judgment.

23rd, 25th, 26th May and 7th, 9th, 10th, 13th and 14th June 1949. The action was tried by McRuer C.J.H.C. without a jury at Welland.

*E. Bristol, K.C.*, and *Peter White, Jr.*, for the plaintiff.

*G. W. Mason, K.C.*, and *J. D. Arnup*, for the defendant Niagara Falls Bridge Commission.

*E. H. Silk, K.C.*, for the defendant The Attorney-General for Ontario.

6th October 1949. McRuer C.J.H.C.:—This is an action brought by the plaintiff for a declaration that the alleged expropriation of lands owned by him in the city of Niagara Falls is illegal and void and that the Minister of Highways of Ontario had not the legal power under The Highway Improvement Act, R.S.O. 1937, c. 56, and amendments thereto, or otherwise, to take and expropriate his lands or to authorize the defendant Niagara Falls Bridge Commission to enter upon and take possession of the said lands; and for a declaration that s. 57a of The Highway Improvement Act, as enacted by 3 Geo. VI, c. 19, s. 4, is *ultra vires* of the Legislature of Ontario, and that s. 57 of the said Act and ss. 8 to 38 of The Public Works Act, R.S.O. 1937, c. 54, are likewise *ultra vires* of the Legislature of Ontario in so far as they purport to empower the Minister of Highways, without the consent of the owner thereof, to enter upon and take and expropriate land or property for the purposes of the international bridge or the work or undertaking of the defendant Niagara Falls Bridge Commission.

Against the defendant Niagara Falls Bridge Commission, a mandatory order is asked directing it to remove its structures upon the lands said to be owned by the plaintiff and to give up possession thereof to the plaintiff and the plaintiff claims an accounting of the rents and profits received by the defendant attributable to its occupation and use of the said lands, or, alternatively, occupation rent for the said lands at the rate of 5 per cent. per annum on the sum of \$124,245.11 from 9th June 1942, being the date of the demand by the plaintiff to the defendant for the said sum in respect of the said lands.

An alternative claim is made for damages for trespass in an amount equivalent to interest at the rate of 5 per cent. per annum on the sum of \$124,245.11 from 9th June 1942 until payment or judgment. Other declarations are asked in the prayer for relief, to which it is unnecessary to refer.



On 28th July 1939 the plaintiff was the owner in fee simple of a block of land situated between Alma Street and Bender Street on the south side of Newman Hill in the city of Niagara Falls, comprising about 24,120 square feet. Considerable evidence was given as to how the plaintiff acquired title to the property in question, but in the view I take of this matter these details are quite irrelevant to the matter I have to decide.

On 27th January 1938, the Falls View Bridge, which spanned the Niagara River about 500 feet south of the plaintiff's lands, collapsed. Following the collapse of this bridge, steps were taken immediately by the then Minister of Highways, the late Honourable T. B. McQuesten, to provide a new bridge over the Niagara River at a suitable point. On 4th February 1938 a bill was introduced into the Dominion Parliament to incorporate a company known as the Niagara Falls Observation Bridge Company. This bill passed the House of Commons but was opposed in the Senate, and on 28th June 1938 it was withdrawn. On 16th June 1938, a corporation known as the Niagara Falls Bridge Commission was incorporated by joint resolution of the Senate and House of Representatives of the United States of America and the construction of a bridge across the Niagara River was authorized. Four Ontario members of the Commission were appointed by Order-in-Council dated 8th July 1938, and on 7th October the Commission authorized two of its members to conduct negotiations for a site for a bridge. In December 1938 an architect was engaged by the Department of Highways to draw up plans for what is called a "plaza", which is shown on the exhibits filed as an area at the bridge-head designed to accommodate the traffic as it immediately approaches or leaves the bridge, and make provision for customs and immigration investigations and the collection of tolls.

On 17th January 1939 an extra-provincial licence was granted under the provisions of The Extra Provincial Corporations Act, R.S.O. 1937, c. 252.

On 27th March 1939 a bill to amend The Highway Improvement Act by adding thereto s. 57a was introduced into the Ontario Legislature. This amendment became law on 27th April. An application was made to the Dominion Government for approval of the plans of a bridge spanning the Niagara River at a point 400 feet on the Canadian side and 500 feet on the

American side, north of the location of the old Falls View Bridge. On 15th April 1939, by P.C. 890, these plans were approved under the provisions of The Navigable Waters' Protection Act, R.S.C. 1927, c. 140.

Considerable evidence was given with reference to the offering of bonds to finance the project and the terms of the contract for the construction of the bridge. I do not find it necessary to consider any of the evidence of this character. It is sufficient to say that the construction was financed by the issue of long-term bonds with provision for a sinking fund. When the bonds are retired the bridge will become public property, one-half vesting in the Province of Ontario and one-half vesting in the State of New York. The profit from the collection of tolls is to provide solely for the retirement of the bonds and there is no provision for any shareholders' profit.

The bridge as planned and constructed consists of a centre steel span and concrete approaches at each end. The extreme westerly end of the Canadian approach rests on the west side of River Road as widened, and is approximately 27 feet above the street level. In order to provide access to the bridge, it was therefore necessary that the highways in that area should by some means be connected at the level of the bridge. It was also important that north and south traffic routes on River Road should be maintained. The problems that confronted the engineers under these circumstances are discussed in the evidence of Mr. R. M. Smith, who was then Deputy Minister of Highways. In addition to maintaining traffic at the proper levels provision for customs and immigration inspection was a necessity. It is obvious that a simple highway leading to the main artery of traffic crossing the river as provided by the bridge would be quite seriously congested in each direction if there were no parking places for automobiles while the passengers were undergoing immigration inspection and customs inspections were being made. It was to meet all these requirements that the idea of the plaza was evolved. It operates as a sort of "clover-leaf" to regulate the traffic approaching from different directions and to provide parking space for automobiles and buses for the purposes I have mentioned. The plaintiff's and other lands were taken for the purposes of this plaza and it is that fact that gives rise to this action.

Of the many points discussed in the comprehensive and able arguments of counsel, the first to be considered is whether there was valid statutory authority for the purported expropriation of the plaintiff's land. If there was, and if the Minister acted in good faith, that is the end of the case, as it was admitted by counsel for the plaintiff that the procedural statutory provisions as to filing plans and notice to the plaintiff were regularly complied with.

It is convenient first to set out the steps taken by the Crown to acquire the lands in question.

On 29th July 1939 the Minister of Highways caused to be filed in the Registry Office of the County of Welland Plan 327, showing the lands belonging to the plaintiff required for the public purposes of Ontario. This is stated to be a "Land Plan". It was signed by the Deputy Minister and bears the following certificate:

"This plan is prepared under my instructions and I hereby require that it be deposited in accordance with R.S.O. 1937, Chap. 54 and Chap. 56, Sec. 60 and Chap. 19, Sec. 4, Subsec. 57a, Amendments 3 Geo. VI 1939."

On 31st July the plaintiff was served with due notice of the filing of the plan.

On 21st September 1939 the Minister of Highways caused Plan 333 to be filed. This is stated to be a "preliminary route plan of the King's Highway in the County of Welland, Assumed by the Minister of Highways, Ontario under authority of R.S.O. 1937, Chap. 56, Sec. 55, Subsec. 1". This plan shows the portions of certain streets in the city of Niagara Falls being assumed as a provincial highway.

On 30th September a notice was published in the Ontario Gazette to the effect that these highways would become vested in the Crown and under the control of the Department of Highways.

On 26th January 1940, the firm of Balfour, Drew and Taylor, solicitors practising in the city of Toronto, wrote to the Secretary of the Department of Public Works on behalf of the plaintiff, enclosing a "Notice of Claim for Compensation". The notice is signed by the plaintiff and refers to the land described in Plan 327, The Highway Improvement Act, c. 56, s. 60, and the amending Act of 1939, c. 19, s. 4 (s. 57a), and the filing of Plan 327.



A claim is made for the sum of \$121,445.11 for compensation for taking the land and buildings in question and interest at 5 per cent. from 31st July 1939 to the date of payment. The notice contains the following clause:

“And take further notice that the said David Gordon Bawtinheimer does not, by the filing of this claim, admit the regularity of the said notice or the filing of the said plan.”

On 2nd February 1940, Plan 341 was filed in the Registry Office for the County of Welland, which is stated to be a “preliminary route plan” of the King’s Highway in the County of Welland, “assumed by the Minister of Highways—Ontario under Authority of R.S.O. 1937, Chap. 56, Sec. 55, Subsec. 1”, and to be deposited in accordance with subs. 3 of s. 55. This plan shows additional streets within the city of Niagara Falls assumed by the Minister of Highways as a King’s Highway.

On 10th February the statutory notice with respect to the highways assumed under this plan was published in the Ontario Gazette.

On 16th April 1940 Plan 344 was filed in the Registry Office for the County of Welland, which plan is stated to be “Plan of the King’s Highway as assumed by Dep. Plans No. 333 & 341 and Land Plan” of the plaintiff’s and other lands described therein. The plaintiff’s lands are referred to as follows:

“Portion coloured blue shews deposited Plan No. 327 being amended and corrected in accordance with R.S.O. 1937, Chap. 54, Sec. 17 & Chap. 56, Sec. 60.”

On 18th April the plaintiff was given the statutory notice following the filing of this plan.

On 16th April 1940, the Minister of Highways signed a certificate which contains the following paragraphs:

“4. That Section 52 [*sic*-53] of the said Highway Improvement Act provides as follows:

“(1) The Lieutenant-Governor in Council, upon recommendation of the Minister, may designate any highway or a system of public highways throughout Ontario to be acquired, constructed, assumed, repaired, re-located, deviated, widened and maintained by the Minister for Ontario as a provincial highway.

“(2) Every highway constructed, designated and assumed in accordance with this section shall be known as a “provincial highway”. 1926, c. 14, s. 51.”

"That pursuant to the said section I have recommended to the Lieutenant-Governor in Council that the approaches to the proposed bridge over the Niagara River between Niagara Falls, Ontario and Niagara Falls, New York, shall be designated as a Provincial Highway . . . .

"6. That pursuant to the powers in me vested by said Section 60 [*sic*-61] of the Highway Improvement Act, I have now allocated to the construction of the approaches to the said bridge, a sum sufficient for the purpose, and I certify that I will complete the construction of the Canadian approach to said bridge as provided for in the specifications and tenders governing the said works, on or before the completion of the main structure or span of the said bridge.

"And I further certify that I will cause to be acquired such land, easements and rights-of-way as may be necessary for the purpose of the said work."

The sections of the statute referred to in this certificate are from the 1927 revision of the statutes, but this clerical error is of no consequence.

This certificate was given pursuant to an order-in-council dated 16th April 1940. The order-in-council reads in part as follows:

"The Committee further advise that the approaches to the said bridge as shown on a certain Plan . . . registered in the Registry Office for the County of Welland on the 21st day of September, 1939 and numbered 333, also on a certain Plan . . . registered . . . on the 2nd day of February, 1940 and Numbered 341, and also the designation of area within these streets as shown on a certain Plan . . . registered . . . on the 16th day of April, 1940 and Numbered 344, copies of which plans are attached hereto and form part hereof, be designated as a public highway pursuant to Section 52 of the Highway Improvement Act."

On 6th May the chief property valuer with the Department of Highways wrote to the plaintiff advising him that on 16th April the Department of Highways had filed Plan 344 expropriating the plaintiff's property and giving notice that the Department would require possession of all of the property before 21st May.

On 25th June 1949 the plaintiff was served with a notice requiring him to appear before His Honour Judge Livingstone, the County Court Judge, to show cause why an order for possession of his property should not be made. On the return of this notice the plaintiff did not appear. An order was made giving the Minister of Highways immediate possession of the plaintiff's property.

On 26th July 1940, an agreement was entered into between the Crown, represented by the Minister of Highways, and the Bridge Commission, under which, in consideration of \$1, the Bridge Commission was given an easement to construct an approach span so that the westerly limit should be on a line approximately 55 feet west of the former westerly limit of River Road, resting with its supports on the property of the Department of Highways.

In August 1941 an agreement was entered into between the Crown and the Bridge Commission, granting a lease until 1st January 1970, or until such earlier date as the bonds issued for the building of the bridge should have been paid off, of those portions of the buildings upon the lands described in schedules "B" and "C", from the level of the plaza at the site of the buildings upwards, but not including the portions of the buildings below the level except as set out therein, together with a right-of-way, etc.

On or about 29th December 1941, the plaintiff was served with a notice of an appointment for a hearing before the Ontario Municipal Board for the purpose of fixing compensation for the taking of his lands. This application was postponed from time to time and eventually came on for hearing on 17th June 1946. In view of the conclusion that I have come to it is unnecessary for me to deal with these proceedings.

The authority under which the Minister purported to act is contained in The Highway Improvement Act, R.S.O. 1937, c. 56, into which ss. 8 to 38 of The Public Works Act, R.S.O. 1937, c. 54, are imported. It is necessary to deal with the provisions of these statutes in some detail. Their purpose is to vest in the Minister of Highways compulsory powers in order that he may lay out public highways to be maintained by the Province for the purpose of the movement of traffic thereon to and from points within the Province, including points connecting the



Province with highways in other adjacent Provinces in Canada or the United States of America. For that purpose he is given power to acquire existing highways vested in local municipalities and lands owned by private individuals.

Section 53 of The Highway Improvement Act gives the Lieutenant-Governor in Council, upon recommendation of the Minister, power to designate any highway or a system of public highways throughout Ontario to be laid out, acquired, constructed, assumed, repaired, relocated, deviated, widened and maintained by the Minister as the King's Highway. Section 54 provides that the King's Highway and all property acquired by Ontario under the Act shall be vested in His Majesty. Section 55 in its original form (R.S.O. 1927, c. 54, s. 54) provided that where the Minister desired to acquire any existing highway he should deposit in the proper Registry Office a preliminary route plan. This being done, the title to the highway becomes vested in the Crown. In 1935 (by c. 25, s. 13) this section was amended to give the same powers to the Minister to acquire lands where he desired to lay out a portion of the King's Highway. Section 57 provides that: "The Minister may, for and in the name of His Majesty, purchase or acquire, and subject as hereinafter mentioned may, without the consent of the owner thereof, enter upon, take and expropriate any land or property *which he may deem necessary for the use or purposes of the Department . . .*" (The italics are mine.) Section 60 provides the machinery to make operative the powers of expropriation provided in ss. 55 and 57; where land is to be taken under the compulsory powers conferred by the Act, the Minister shall proceed in the manner provided by The Public Works Act and the provisions of that Act, ss. 8 to 38 inclusive, are made to apply, *mutatis mutandis*, except where inconsistent with other provisions of The Highway Improvement Act..

Subs. 3 of s. 60 is applicable where land along or adjacent to or in the vicinity of the King's Highway is to be acquired under any of the powers conferred by the Act. It provides: ". . . the land so acquired may be shown on a plan of the highway marked 'Land Plan,' signed by the Minister or by the Deputy Minister and deposited in the proper registry office, and such plan shall be of full effect in establishing the ownership of such lands by Ontario under any of the provisions of this Act or of *The Public Works Act.*"

Subs. 4 provides for the amendment of a "Land Plan" filed under subs. 3: "A land plan deposited in any registry office as in subsection 3 provided may be amended upon the authority of the Minister or Deputy Minister from time to time, or another or similar plan may be substituted therefor upon like authority, for the purpose of showing land or additional lands purchased or acquired, or for the purpose of indicating thereon lands sold or disposed of by the Minister."

Section 17 of The Public Works Act provides:

"(1) Where the Minister desires to expropriate land under the power conferred by this Act he shall deposit in the proper registry office a plan and description of the land signed by himself or by the deputy minister or by the secretary of the Department, or by the superintendent of the public work, or by an engineer of the Department or by an Ontario land surveyor, and such land shall thereupon become and be vested in the Crown . . . .

"(5) In all cases, when any such plan and description, purporting to be signed by the deputy minister . . . is so deposited the same shall be deemed to have been deposited by the direction and authority of the Minister, and as indicating that in his judgment the land therein described is necessary for the purposes of the public work, and the plan and description shall not be called in question except by the Minister, or by some person acting for him or for the Crown."

Under s. 79 of The Highway Improvement Act, where any claim for damages or compensation in respect of land taken or as to the right of the Department to undertake any work for the purposes of a highway is made, no action or other proceedings shall lie in respect of such matter, but the same shall be heard and determined by the Ontario Municipal Board.

In 1939 s. 57a was introduced into The Highway Improvement Act. This section deals expressly with the subject of providing approaches to the bridge here in question. It may be broken down into three parts—(a) where the Minister receives from the Niagara Falls Bridge Commission a copy of a resolution of the Commission sealed with the seal and signed by the chairman of the Commission, stating that the Commission requires land or property located in Ontario therein described "*for the purposes of the Commission*" the Minister may take and expropriate land or property which he may deem necessary for

the use or purposes of the Department of Highways; (b) where the Minister deems any land or property necessary *for the purposes of the Commission* he may take similar expropriation proceedings; and (c) where the Minister deems any land or property necessary *for the purpose of constructing a highway to connect any bridge of the Commission, or any approach thereto*, with any highway, he may without consent of the owner expropriate such lands and property. Subs. 2 makes applicable to proceedings under this section the same provisions of The Public Works Act as are made applicable to the procedure under s. 60.

The effect of the filing of the four plans can be understood only by relating them closely to the statutory provisions with which I have just been dealing. As I have stated Plan 327, dated 29th July 1939 (ex. 5), is a "Land Plan" and stated to be filed under the provisions of The Public Works Act and s. 60 of c. 56, and s. 57*a* of The Highway Improvement Act. Subs. 3 of s. 60, being the section which refers to a "land plan", is not applicable to the lands described under the conditions as they existed on 29th July 1939. These were not lands "along or adjacent to or in the vicinity of" a King's Highway at that time. As far as this plan is concerned it is obvious that the intention was to exercise the powers contained in s. 57*a*. This I shall discuss later. When Plan 333 (ex. 10) was filed the Department must have been acting under the provisions of s. 55 and purported to do so. The effect of this plan was to vest the portions of highways designated thereon in the Crown as the King's Highway. From the date of the filing of this plan, the plaintiff's land became land adjacent to or in the vicinity of the King's Highway. Similarly, the filing of Plan 341 (ex. 11) vested the portions of highways indicated thereon in the Crown as the King's Highway. These lands formed boundaries of the plaintiff's land. Plan 344 purports to be filed as a plan of the King's Highway filed under the provisions of s. 55 and a "land plan" filed under the provisions of s. 60, subs. 3 and subs. 4 (giving power to file amended plans). At the time of the filing of this plan, the plaintiff's lands being adjacent to or in the vicinity of the King's Highway as established by Plans 333 and 341, if the provisions of s. 60 were available to the Minister they would be effective to vest the title to the



plaintiff's property in the Crown, provided he acted in good faith.

But it is argued that the enactment of s. 57a, being a specific enactment purporting to give special affirmative powers in respect of the subject matter of acquiring land "for the purposes of the Commission" or "for the purpose of constructing a highway to connect any bridge of the Commission or any approach thereto", must be taken to have excluded all other provisions contained in the statute concerning the subject matter of providing highway connection with the bridge in question. It is contended that the principle expressed by the maxim *expressio unius est exclusio alterius* should be applied, and that the statutory provisions under which Plan 344 was filed are not therefore available to vest title in the Crown. In support of this argument counsel relies on *Ex parte Stephens* (1876), 3 Ch. D. 659; *Blackburn v. Flavelle* (1881), 6 App. Cas. 628; and *London Association of Shipowners and Brokers v. London and India Docks Joint Committee*, [1892] 3 Ch. 242 at 250. Having therefore, by the application of the principles discussed in these cases, excluded the provisions of s. 60, counsel for the plaintiff goes on to argue that s. 57a is *ultra vires* of the Provincial Legislature and contends there was therefore no authority for filing Plan 327 and the Crown got no title either under it or under Plan 344. This case may be disposed of without deciding whether the maxim as discussed and applied in these cases should be applied or not. The plaintiff is in any case on the horns of a dilemma with the argument presented. In order that the maxim *expressio unius est exclusio alterius* should be applicable there must be a statutory expression of the intention of the Legislature by valid legislative action with reference to the subject matter. If that legislative effort is *ultra vires*, the legislation is of no effect whatever. It "is a complete nullity, a nullity of *non esse*. *Defectus potestatis, nullitas nullitatum*. No power can give it vitality"; per Taschereau J. in *Lenoir et al v. Ritchie* (1879), 3 S.C.R. 575 at 624; cf. Cooley's Constitutional Limitations, 8th ed. 1927, p. 382; *Norton v. Shelby County* (1886), 118 U.S. 425 at 442; *Chicago, Indianapolis & Louisville Railway Company v. Hackett* (1913), 228 U.S. 559 at 566. If, therefore, s. 57a is *ultra vires* the Act remains as if this section had never been passed and all of the provisions of s. 60 would be available to the Minister. If, on the other hand, it is *intra vires*, the

Minister had power to act under it so long as he made use of his powers in good faith.

However, I do not think that the portion of s. 57*a* under which the Minister purported to act is *ultra vires* of the Provincial Legislature. As I have indicated, the section can be broken down into three parts. At no time was any action taken under the first or second part. The Minister did not purport to expropriate the plaintiff's lands at the request of the Commission or for the purposes of the Commission. In filing Plan 327 he purported to take the lands for the purposes of the Province of Ontario and it is the last part of s. 57*a* that applies to that exercise of the Minister's power.

In support of the argument that s. 57*a* is *ultra vires* it is contended that the powers of the Commission as set out in its charter are “. . . to construct, maintain and operate a bridge and approaches thereto across the Niagara River . . .”; that it is therefore a work and undertaking extending beyond the limits of the Province, coming within the exceptions mentioned in s. 92(10) of The British North America Act and within the legislative jurisdiction of the Dominion of Canada under s. 91(29). Whatever may be said in support of this argument as applied to the portion of s. 57*a* which confers on the Minister power to expropriate land at the request of or for the purposes of the Commission, I do not think the argument has any application to the powers conferred on the Minister under that part of the section that gives him power to expropriate land “for the purpose of constructing a highway to connect any bridge of the Commission, or any approach thereto, with any highway”. I think it clear that the Province has constitutional power to give the Minister of Highways authority to expropriate land for the purpose of constructing a highway to connect with any international bridge or with any other undertaking connecting the Province with any other country or any other Province.

It was not seriously argued that this portion of the section, if it stood alone, would be *ultra vires*, but it was argued that it was not severable. With this argument I do not agree. As I have pointed out, the section purports to give to the Minister three distinct powers to expropriate land. The first is dependent upon the Commission passing a resolution, and forwarding a copy thereof to the Minister, showing that the Commission

requires land or property in Ontario for the purposes of the Commission. The second depends on the Minister deciding that land in Ontario is necessary for the purposes of the Commission; and the third is of quite a different character; it depends on the Minister deciding that land is necessary for the purpose of constructing a highway to connect any bridge of the Commission or any approach thereto with any highway.

The test of severability is: Would the Legislature have enacted the portion of the section conferring the third power on the Minister without the portion conferring the first and second? *Attorney-General for Manitoba v. Attorney-General for Canada et al.*, [1925] A.C. 561, [1925] 2 D.L.R. 691, [1925] 2 W.W.R. 60; *Toronto Corporation v. York Corporation*, [1938] A.C. 415 at 427, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452; *Sullivan v. McGillis*, [1949] S.C.R. 201 at 211, [1949] 2 D.L.R. 305, 93 C.C.C. 175.

Accepting for the purpose of this part of the discussion the argument that the Legislature intended s. 57a as a complete statutory code dealing with the subject matter of acquiring land for the purpose of providing access to the bridge to be constructed by the Commission, it is quite clear that the predominant purpose of the legislation was to provide proper access to the bridge for the travelling public. It would therefore seem clear that one power the Legislature would wish to confer on the Minister would be power to acquire land on his own initiative for the purpose of constructing highway accommodation connecting the bridges with other highways in the vicinity. It would seem equally clear that the Legislature would wish that this power might be exercised quite independently of what land the Commission might require for its own purposes or what the Minister might deem necessary for the purposes of the Commission.

Without making any finding as to the constitutional validity of the first and second clauses of s. 57a, I therefore find that the portion of the section under which the Minister purported to act is *intra vires* and severable..

If this view is correct it matters not whether the maxim *expressio unius est exclusio alterius* applies or not. As I have pointed out, s. 57a imports the powers of The Public Works Act in precisely the same terms as s. 60(1). Plan 327 (ex. 5), filed



on 29th July 1939, describing the plaintiff's lands, purports to have been filed in accordance with s. 17 of The Public Works Act and would be just as effective to transfer title to the Crown as a plan filed under s. 60. On the other hand, Plan 344, filed on 16th April 1940, being a plan of highways assumed under Plans 333 and 341 and a "Land Plan" covering the plaintiff's and other lands, purports to be filed under the provisions of The Public Works Act and The Highway Improvement Act, s. 60. Whether the Minister exercised his powers under s. 17 of The Public Works Act, by virtue of the provisions of s. 57a or s. 60 of The Highway Improvement Act, the result is the same. The title to the land passed to the Crown. It is therefore a matter of indifference whether I accept the argument of counsel for the plaintiff that s. 57a ousts the application of all other sections or whether I accept the argument of counsel for the defendants that the Minister could, notwithstanding the provisions of s. 57a, act under s. 60, or whether the Minister could act under both sections. It is likewise a matter of indifference whether s. 57a is *ultra vires* in its entirety or not. If it is, as I have already stated ss. 57 and 60 have not been interfered with by legislative action and the filing of Plan 344 would operate as an effective transfer of title to the Crown.

So far I have dealt with the matter as if the maxim *expressio unius est exclusio alterius* applied to this statute. My view is that it does not. I think s. 57a, considered in relation to the other sections of the Act, shows a legislative intention to supplement the powers conferred under the Act prior to its enactment rather than an intention to create a complete legislative code governing the expropriation of land for the purpose of providing ingress to and egress from the bridge, excluding all the other statutory powers of expropriation vested in the Minister.

Only one question remains to be discussed: was there a valid exercise of the discretionary power vested in the Minister? As I have already pointed out, under the last part of s. 57a, before expropriation proceedings may be taken, the Minister must deem "land . . . necessary . . . for the purpose of constructing a highway to connect any bridge of the Commission, or any approach thereto, with any highway". Under s. 60, as read with s. 57, the Minister may expropriate land which he "may deem necessary for the use or purposes of the Department". As I

understand it, the argument of the plaintiff on this branch of the case may be summarized as follows: The Minister, while purporting to expropriate the plaintiff's land for the purposes of the Department of Highways and the Province of Ontario, was in fact expropriating it for the purposes of the Commission; the purpose of the Commission is to carry on an undertaking connecting Ontario with the State of New York and hence no legislation of the Province of Ontario could authorize the Minister to exercise the power he in fact exercised.

The Minister's authority to expropriate lands under The Public Works Act and The Highway Improvement Act may be exercised when he finds as a fact that the lands in question are necessary for the public purposes of Ontario, or the use or purposes of any Department of Government or for the purposes of the Department of Highways, as the case may be. A long line of cases has firmly established that where functions of this character are conferred on an administrative officer, his findings of fact and the exercise of his power based on the facts as found by him are not reviewable by the Courts, provided he acts honestly and his finding is based on some evidence. He may even give himself jurisdiction to act by a wrong finding of fact, as long as he acts honestly.

Of all the authorities dealing with this subject, the language of Lord Esher M.R. in *Reg. v. The Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313 at 319, is most often relied on as a clear and comprehensive statement of the law dealing with the exercise of administrative functions, Lord Esher stated:

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body

with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Duff J. in *Wilson et al v. Esquimalt and Nanaimo Railway Company*, [1922] 1 A.C. 202 at 212, 61 D.L.R. 1, [1921] 3 W.W.R. 817, 28 C.R.C. 296, dealing with the submission that there was no "reasonable proof" on which the Lieutenant-Governor in Council might act, said:

"Whether or not the proof advanced was 'reasonable proof' was a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative could not be questioned in any Court so long, at all events, as it was not demonstrated that there was no 'proof' before him which, acting judicially, he could regard as reasonably sufficient."

Reference may also be made to *Allen v. Sharp* (1848), 2 Exch. 352, 154 E.R. 529; *Rex v. Bloomsbury Income Tax Commissioners*, [1915] 3 K.B. 768, per Lord Reading at p. 785; and *The King v. Noxzema Chemical Company of Canada, Limited*, [1942] S.C.R. 178, [1942] 2 D.L.R. 51.

In support of this branch of the argument, counsel stressed that a portion of the lands taken was used for the accommodation of customs officers, immigration officers and those engaged in the collection of tolls for the use of the bridge, and that agreements were entered into, making the expropriated lands subject to certain easements and rights-of-way in favour of the Commission. I do not think these facts, taken with the evidence as a whole, establish lack of good faith in the Minister, an onus which lies on the plaintiff.



Mr. Smith was the Deputy Minister of Highways at the time and his evidence clearly establishes the very complex nature of the problem of providing highway accommodation for the travelling public at the bridge-head. It was a responsibility of the Minister of Highways to provide access to the bridge. This involved establishing a highway at the proper level by the use of a "clover-leaf" so as to provide for traffic on River Road. Provision had to be made for parking automobiles while customs and immigration inspections were being made. In order to meet all these requirements the plaza was constructed by the Department of Highways. I do not think the mere fact that certain rights were given to maintain buildings on the plaza for the purposes of customs and immigration officers and for the collection of tolls on the bridge would destroy the Minister's power to make provision for the travelling public in the manner in which he did, nor is it convincing evidence of bad faith.

It may well be that the interests of the Commission and the interests of the Province of Ontario are in some measure the same, quite irrespective of the fact that the property in the bridge to the centre of the Niagara River will ultimately vest in the Province; but community of interest would not render an exercise of the power of expropriation for the purpose of providing accommodation of the character in question, for the public using the highways of the Province, *ultra vires*.

I find as a fact that the Minister acted in perfect good faith in taking the course that he did and that the land was taken for the legitimate purposes of the Department of Highways and the Province of Ontario. It therefore necessarily follows that the plaintiff is confined to s. 79 of The Highway Improvement Act for any relief to which he may be entitled.

The plaintiff having failed on all points argued by counsel on his behalf, it is unnecessary for me to consider the issues raised in defence.

The action will be dismissed with costs.

*Action dismissed with costs.*

*Solicitors for the plaintiff: White, Bristol, Gordon, Beck & Phipps, Toronto.*

*Solicitors for the defendant Niagara Falls Bridge Commission: Mason, Foulds, Davidson & Arnup, Toronto.*

*Solicitor for the defendant The Attorney-General for Ontario: C. R. Magone, Toronto.*

## [COURT OF APPEAL.]

## Craig et al. v. Milligan.

*Trials—Jury Trial—Discretion of Trial Judge as to Dispensing with Jury—Mention of Insurance during Trial of Action Arising out of Automobile Accident—"Election" by Counsel—The Judicature Act, R.S.O. 1937, c. 100, s. 55(3).*

During the trial, before a jury, of an action arising out of an automobile accident, one of the witnesses called by the defendant mentioned a fact which indicated that the defendant was insured. The trial judge asked the jury to withdraw, and then heard counsel for all parties. Counsel for the plaintiffs (who had served the jury notice) stated that he was willing to withdraw the jury notice and proceed with the trial without a jury. Counsel for the defendant (who was also plaintiff by counterclaim) asked that the jury be not discharged, and that the trial proceed before them. After taking time to consider, the trial judge announced that in the exercise of his discretion he had decided to discharge the jury and proceed with the trial himself. He gave judgment for the plaintiffs, and the defendant appealed, contending, *inter alia*, that the trial judge was bound to give to the defendant, as plaintiff by counterclaim, the right to elect whether or not to proceed without a jury, under the rule laid down in *Fillion v. O'Neill*, [1934] O.R. 716, and that he must be governed by that election.

*Held*, the appeal must be dismissed.

*Per* LAIDLAW and HOPE J.J.A.: Notwithstanding any expression of desire by counsel, the trial judge has a complete discretion, under s. 55(3) of The Judicature Act, either to traverse the case for trial by another jury or to proceed himself without a jury, provided he gives all counsel a full opportunity to be heard, and to make such representations as they think fit. He is not bound to act according to the expressed desire of counsel.

*Per* HOGG J.A.: The basis of the decision in *Fillion v. O'Neill*, *supra*, is that the judge's discretion is ousted in these special circumstances by the election of counsel for the plaintiff. This rule, being an exception to the general rule as to the discretion of the judge presiding at a trial, should be confined to cases which are in all respects similar, and should not be so extended as to enable a plaintiff by counterclaim to elect in such a manner as to bind the judge and exclude the exercise of his discretion.

*Appeals—Reversal of Findings of Fact—Judge Sitting without Jury—Objective Fact Inconsistent with Findings—Necessity for Clear Proof of this Fact.*

The rule, as laid down in *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243, that an appellate Court may reverse a finding of fact made by a judge sitting without a jury if there is an objective fact, established by the evidence, which is inconsistent with the finding and thus falsifies it, applies only where the objective fact is established beyond controversy by the evidence, so as to be indisputable. If the evidence relied upon to establish the fact is rejected by the trial judge, there is no room for applying the rule or disturbing his findings of fact.

AN APPEAL by the defendant from a judgment of Barlow J. in favour of the plaintiffs in an action arising out of an automobile collision.

12th and 13th September 1949. The appeal was heard by LAIDLAW, HOPE and HOGG J.J.A.

*J. R. Cartwright, K.C.*, for the defendant, appellant: It was not necessary for the trial judge to discharge the jury at all. Counsel for the defendant, who was the only party that could be injured by the reference to insurance, not only did not object to proceeding before the jury, but urged the trial judge not to discharge them.

If, however, the trial judge deemed it unsafe to continue with that jury, he was bound to give counsel for both parties the right to elect whether they would go on before him, without a jury, or would have the trial adjourned for another jury. There is a high right to trial by jury, and if a trial judge is of the opinion that the jury should be discharged, for some such reason as here, he should proceed without a jury only if both parties wish him to. The case is stronger where, as here, there are in effect two plaintiffs, the defendant here being a plaintiff by counterclaim. Where a jury notice has been served, in a proper case, then both parties have a right to have the action tried by a jury. It is not necessary, in the circumstances of this case, for the defendant to serve a jury notice, where the plaintiff has already done so. The matter is governed by s. 55 of The Judicature Act, R.S.O. 1937, c. 100. If the parties, when called on to elect, do not agree, then the party desiring a jury should succeed. The trial judge disregarded the rule laid down in *Fillion v. O'Neill*, [1934] O.R. 716 at 726-8, [1934] 4 D.L.R. 598, followed in *Freedman et al. v. Reliable Motor Transport Company et al.*, [1943] O.W.N. 387, 10 I.L.R. 235. I refer also to *Logan et al. v. Wilson et al.*, [1943] 4 D.L.R. 512, and *McAuliffe v. Hubbell*, 66 O.L.R. 349, [1931] 1 D.L.R. 835.

On the merits, the findings of fact of the learned trial judge should be reversed according to the principles laid down in *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243. The position of the disabled motor vehicle is an objective fact which falsifies the only finding of negligence against the defendant, *viz.*, that he was on the wrong side of the road. It is clear that if the disabled car was at an angle of 45 degrees to the curb, as sworn in the evidence, the plaintiff driver could not have passed it without crossing on to the wrong side of the road.

The amount of damages awarded to the plaintiffs is excessive.

*G. W. Mason, K.C.*, for the plaintiffs, respondents: If no detriment to the defendant is shown to have resulted from any



error at the trial, then no new trial should be ordered. The evidence of the defendant was such that it could not be accepted by anyone, and there was evidence to support the trial judge's finding that the plaintiffs' car was on the right side of the road.

No exceptions can be engrafted on to s. 55(3) of The Judicature Act, which gives to the judge presiding at a trial an absolute discretion to dispense with the jury. The defendant did not serve a jury notice, as is commonly done where there is a counterclaim. When the jury notice was served, the only issues to be tried were those raised by the plaintiffs' claim, since the counterclaim was not yet in. *Fillion v. O'Neill*, *supra*, is distinguishable, if its background is considered. I refer also to *Brown v. Wood* (1887), 12 P.R. 198, and *Wilson v. Kinnear*, 57 O.L.R. 679, [1926] 1 D.L.R. 241.

The trial judge cannot be bound to exercise his discretion in a particular way; that would be equivalent to abolishing the discretion: *The Attorney-General v. Emerson et al.* (1890), 24 Q.B.D. 56; *Hope et al. v. Great Western Railway Company*, [1937] 2 K.B. 130 at 138; *Donald Campbell and Company, Limited v. Pollak*, [1927] A.C. 732 at 787.

As to the practice, I refer also to *Gowar v. Hales*, [1928] 1 K.B. 191; *McNeil v. Fingard*, [1945] O.R. 396 at 404, [1945] 3 D.L.R. 389; *Freedman et al. v. Reliable Motor Transport Company et al.*, *supra*; *Flynn v. Saunders*, [1947] O.W.N. 975; *Telford v. Secord*; *Telford v. Nasmith*, [1947] S.C.R. 277 at 282, [1947] 2 D.L.R. 474.

*J. R. Cartwright, K.C.*, in reply: Insurance was not involved in either the *Flynn* case or the *Telford* case. If s. 55(3) of The Judicature Act gives an absolute discretion to the trial judge in these circumstances, then the *Fillion* and *Logan* cases, *supra*, are wrongly decided, and that cannot be argued in this Court. Section 55(3) was in the same form at the time of the *Fillion* judgment, and this, like it, was "essentially a case to be tried by a jury". The right of each party is a right to a trial by jury and if they do not agree then the one who wants a jury is entitled to it. The Court should not take away an ancient right.

*Cur. adv. vult.*

14th October 1949. LAIDLAW J.A.:—This is an appeal by the defendant from a judgment pronounced by Barlow J. on the 22nd October 1948. The action was brought by the respondents

to recover loss and damages arising by reason of a collision between a motor vehicle owned by the respondent Lee T. Craig, driven by the respondent Ruth G. Craig, and in which the respondent Alice Gordon was a passenger, and a motor vehicle owned and driven by the appellant. The appellant counterclaimed for loss and damages suffered by him.

The trial of the action commenced with a jury. After it had proceeded for a day and a half, a witness called for the defence inadvertently volunteered the information that an insurance agent had visited him and talked to him about the accident. After hearing counsel for all parties, the learned judge discharged the jury and continued the trial to conclusion without a jury. Judgment was reserved and was subsequently given in favour of the respondent Lee T. Craig in the sum of \$658.56, for the respondent Ruth G. Craig in the sum of \$2,500, and for the respondent Alice Gordon in the sum of \$20,000, together with costs.

The collision occurred on the 15th November 1947, on a bridge forming part of the Queen Elizabeth Highway just west of the town of Oakville. The highway runs in an easterly and westerly direction, and at the place of the accident is 40 feet in width. There are four traffic lanes on the highway, two of them on the north side of the centre-line for westbound traffic, and two on the south side of the centre-line for eastbound traffic. The most northerly traffic lane is referred to as the westbound driving lane. The next lane on the south is referred to as the westbound passing lane. The lane immediately south of the centre-line is the eastbound passing lane, and the most southerly lane is the eastbound driving lane.

The events leading up to the collision occurred in this order: A motor vehicle driven by one W. A. Wilson was proceeding in an easterly direction on the bridge when the vehicle got out of control on the icy pavement and ran to the north side of the highway, struck the curb with the left front wheel, and came to rest in a disabled condition with the front of the vehicle facing in a south-easterly direction and the left rear wheel near the north curb. The respondent Ruth G. Craig was driving in the westbound driving lane and saw the stalled vehicle. She passed it in safety, and when she was a short distance west of it the vehicle driven by her collided with a vehicle travelling towards

her and driven by the appellant. There was much dispute as to the position on the highway of the stalled vehicle, and also as to the place of collision with reference to the centre-line of the highway. The learned trial judge made the following findings of fact, which I extract from his reasons for judgment and enumerate as follows: (1) "After the collision both cars came to rest on the northerly half of the highway, in the westbound passing lane". (2) At the time of the collision the car driven by the respondent Ruth G. Craig "was going straight" and the car driven by the appellant was proceeding at an angle. (3) "The impact took place north of the centre-line in the westerly-bound passing lane". (4) "The Wilson car was clearly on less than a 45-degree angle, and . . . [it] was, at the time Mrs. Craig passed it, in the northerly driving lane." (5) The appellant "came too quickly on to the bridge behind a truck, . . . the truck slowed down abruptly, and [the appellant] in pulling to the left to avoid striking the truck, ran across the road into the westerly-bound passing lane". (6) The negligence of the appellant was the sole cause of the accident.

The learned trial judge stated that he was very favourably impressed by the straightforward manner in which Mrs. Craig gave her evidence, and that he accepted her evidence without hesitation. He also accepted the evidence of W. A. Wilson, the owner and driver of the disabled car, and of the passengers who were in it. He said plainly that it was clear to him that the evidence of the appellant and of the passengers in the car driven by him was not reliable, and that one of the defence witnesses, Harold Fischer, "clearly gave untrue evidence".

There are two main grounds of appeal:

(1) That the learned trial judge erred in discharging the jury and proceeding with the trial without giving the defendant the right to elect to have the case tried by another jury.

(2) That the findings of fact of the learned trial judge were in error.

In support of his argument that the learned trial judge was in error in withdrawing the case from the jury, counsel for the appellant referred to the following cases: *Fillion v. O'Neill*, [1934] O.R. 716, particularly at pp. 726-8, [1934] 4 D.L.R. 598; *Freedman et al. v. Reliable Motor Transport Company et al.*, [1943] O.W.N. 387, 10 I.L.R. 235; *Logan et al. v. Wilson et al.*,



[1943] 4 D.L.R. 512; *McAuliffe v. Hubbell*, 66 O.L.R. 349 at 354; [1931] 1 D.L.R. 835 and *Grinhan et al. v. Davies*, [1929] 2 K.B. 249. He urged that the learned trial judge disregarded the rule laid down by the Court of Appeal in *Fillion v. O'Neill*, *supra*, and that under the circumstances which arise in this case the discretion of the learned trial judge as to the course to be followed was limited by the rule laid down in that case.

The circumstances giving rise to the order of the learned trial judge discharging the jury may be stated briefly. As previously mentioned, a witness called for the defence stated in the course of cross-examination that: "... after the accident there was an insurance agent came to me ... he came to me and asked me a few questions about the accident, and I told him Yes, so he talked to me a while about the accident, and that was all I heard about it until I believe it was Friday they came down and told me that I may have to come up here." That answer as quoted was not made in response to a question requiring or suggesting the mention of insurance, and the error is not attributable in any way to counsel for the respondents. After re-examination of the witness was completed, the learned trial judge directed the jury to retire and he then heard counsel for all parties. Counsel for the respondents took the position at once that he was willing to withdraw the jury notice given by the respondents. He made it plain that he elected to proceed with the trial without the jury. Counsel for the appellant urged that the jury should not be taken away and pleaded "to allow the jury to remain". The matter was argued at length, and the learned trial judge took time to consider the question in controversy. Thereafter he decided that the jury should be discharged and the trial should proceed before him without a jury. He gave reasons for his decision, and it appears from them that he understood clearly that in the circumstances the respondents had a right to elect whether they would proceed with their case without a jury or have it adjourned to a later date to be tried with a jury.

It may be, and I presently assume without deciding the question, that the appellant in his capacity of plaintiff by counter-claim also had a like right of election although no jury notice was given by him. Counsel for the appellant did not ask the learned trial judge in express language to direct that there be a

new trial with a jury, but he argued at length that the jury should not be discharged and made it plain that the appellant desired trial with a jury. He was afforded full opportunity to present argument in the matter under consideration, and he stated that he had completed his argument and submissions to the Court before the learned trial judge reached his decision to discharge the jury. There was no failure on the part of the learned trial judge to allow counsel for all parties the fullest opportunity to exercise whatever rights were possessed by the respective parties and to present argument in support of their positions.

After hearing counsel in the manner described, the learned trial judge took nearly half an hour, according to the record, to reach a decision and stated that he had decided to discharge the jury in the exercise of his discretion as the presiding judge. Again, in discharging the jury he told them that he came to his conclusion to continue the trial without them in the exercise of his discretion. Finally, in his written reasons for judgment after trial he states: “. . . after hearing argument of counsel, in the exercise of my discretion I dismissed the jury and proceeded with the trial.”

Thus it appears to me that the learned trial judge did not consider that the question whether he should proceed without a jury was concluded by the election of counsel for the respondents to proceed in that way. He did not reach his decision on the understanding that he was bound to give effect to the election as made by counsel for the respondents. On the contrary it appears to my satisfaction that he proceeded on the understanding that he possessed the power to exercise a discretion as to the mode of trial which was paramount to the right of election possessed by any or all parties in the special circumstances of the case. If he had felt bound in law to follow and give effect to the election of counsel for the respondents, he would not have needed time to consider his decision. He would not have said repeatedly that he exercised his discretion in deciding the question, because it is plain that if he was bound by the election of counsel he would have no discretion in the matter.

It is my view that the power vested in a judge presiding at a trial, as provided by s. 55(3) of The Judicature Act, R.S.O. 1937, c. 100, to direct that the issues of fact shall be tried or the dam-

ages assessed without the intervention of a jury is not divested by the election made by one or more of the parties to the action. Notwithstanding an election to continue the trial without a jury in circumstances existing in the present case, the learned trial judge in the exercise of his discretion could have ordered that the trial be adjourned to a later date to be tried with a jury. Conversely, an election by one or other or all counsel to have the case tried with a jury at a later date would not deprive the presiding judge of the right in the exercise of his discretion to order that the trial proceed without a jury. Of course the election as made by one or more of the parties should be given great consideration by the presiding judge in reaching his decision, but again I make my view plain that the right vested by statute in the judge presiding at the trial to determine the mode of trial is not impaired or limited to any extent by the right of election of one or more of the parties under the circumstances of this case. Therefore, I cannot accept the argument of counsel for the appellant that the discretion of the learned trial judge as to the course to be followed was limited by the rule laid down in *Fillion v. O'Neill, supra*. The decision in that case should not be extended to apply to different facts and circumstances. Davis J.A. stated plainly that "the exercise of a discretion by a trial Judge should not be interfered with except in extreme cases. . . ." That case was extreme because of "the failure of the trial Judge to permit the plaintiff to elect . . . whether she would proceed with her case without a jury, or have it adjourned to a later date to be tried with a jury." It was held that the denial of that right was not an exercise of discretion by the trial judge, but a deprivation of a substantial right. It was for that reason that the Court of Appeal reviewed and interfered with the order made by the trial judge as to the mode of trial.

No fault can be found in the present case with the practice adopted by the learned trial judge, and, as I have stated, his discretion was exercised after full opportunity to all counsel to exercise and assert their rights. When the proper practice has been followed, as it was in this case, and there has been no deprivation of any substantial right of the parties, the general rule should be followed and this Court should not review or interfere with the exercise of discretion by the judge presiding at trial. The principle which is applicable to the circumstances



of the case is stated in *Telford v. Secord*; *Telford v. Nasmith*, [1947] S.C.R. 277 at 282, [1947] 2 D.L.R. 474 as follows:

"There rests with the trial judge sufficient power and authority to conduct the trial as it should be conducted, and, should he see reason to try the action without a jury or to dispense with the jury at any stage, his discretion is not subject to review."

I refer also to *Brown v. Wood* (1887), 12 P.R. 198; and *Wilson v. Kinnear*, 57 O.L.R. 679 at 680, [1926] 1 D.L.R. 241.

In support of the second main ground of appeal, namely, that the findings of fact of the learned trial judge were in error, it was urged by counsel for the appellant that the position of the disabled motor vehicle on the north portion of the highway was established definitely by the evidence of independent witnesses and was overwhelmingly opposed to the finding of the learned trial judge "that the Wilson car was clearly on less than a 45-degree angle, and at the time Mrs. Craig passed it it was in the northerly driving lane". Counsel relied on plans (exhibits 23 and 24) showing that if this vehicle was standing on the highway at the angle to the north curb stated by the witnesses in charge of it, it would have been physically impossible for the motor vehicle driven by Mrs. Craig to pass it without going well to the south of the centre-line of the highway. He endeavoured to satisfy the Court that the position of the disabled car is a determinant and indisputable fact, and that the case falls within the class of cases in which the findings of the learned trial judge may be falsified by that objective fact. He relies upon the principle stated by Lord Wright in *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243 at 267-8, as follows:

"Yet even where the judge decides on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact; thus in a collision case by land or sea the precise nature of the damage sustained by the colliding objects or their relative or final positions may be determinant and indisputable facts . . ."

I cannot give effect to the argument of counsel for the appellant. It was not established as an objective fact that the position of the disabled vehicle on the highway was such that it was physically impossible for the vehicle driven by Mrs. Craig to pass it without going south of the centre-line of the highway. W. A. Wilson testified that the vehicle was standing at a 45 to

50-degree angle from the north curb—measured from the curb to the left front of his car. Alexander Wilson also stated that the position of the disabled car when it came to rest was “on about a 45-degree angle from the curb”, and on cross-examination he agreed with the evidence given by his father (W. A. Wilson) as stated that the car “was at an angle of 45 or 50 degrees from the curb”. Counsel for the appellant emphasized that those witnesses impressed the learned trial judge as “unbiased, independent witnesses”. But it was pointed out clearly by the learned trial judge in his reasons for judgment that W. A. Wilson also stated in evidence that “his car took up the northerly lane, and that there was a space of 10 or 12 feet from the front of his car to the centre of the road”. The learned trial judge also pointed out that Alexander Wilson said in his evidence that in his opinion the angle was much less than 45 degrees and that there was lots of room to pass between the disabled car and the centre of the road. It was quite open to the learned trial judge to reject that part of the evidence of witnesses who stated that the disabled car was at an angle of 45 degrees or more, and to accept the part of the evidence that it was in the westbound driving lane, that no part of the car was in the westbound passing lane and there was “lots of room for a car to pass”. The evidence as to the position of the standing car was very carefully considered and discussed by the learned trial judge, and in my opinion this Court ought not to interfere with the findings of fact made by him.

My opinion is that the appeal should be dismissed with costs.

HOPE J.A.:—I agree with the reasons of my brother Laidlaw. With respect, I would like to add that in my opinion the substantial right of the plaintiff, referred to in the judgment in *Fillion v. O'Neill*, [1934] O.R. 716, [1934] 4 D.L.R. 598, was the prime and statutory right of a party to serve a jury notice in a case of a kind triable with a jury. In the *Fillion* case the plaintiff was deprived of that right of election as to the mode of trial which he preferred. The incident of the mention of insurance before the jury in a motor negligence action, resulting in the taking of the case from that jury, cannot do more than leave the plaintiff with his right by statute unimpaired, namely, to serve a jury notice at his option, as provided by s. 55 of The Judicature Act. This preservation of his right does not,

however, become an absolute right, but is at all times subject to the limitations contained in subs. 3 of said s. 55.

That the so-called rule in the *Fillion* case must yield to the general provision of The Judicature Act becomes all too apparent when one is confronted with a situation or "impasse" such as that which confronted the learned trial judge in the present case—where the plaintiff, having been accorded his "right", elected for a trial without a jury, and the plaintiff by way of counterclaim, similarly accorded his "right", elected for trial by a jury.

Subject to the foregoing notation, I completely agree with the reasons and disposition of my brother Laidlaw.

HOGG J.A.:—This appeal is from a judgment pronounced by Mr. Justice Barlow on the 22nd October 1948, in which he held that the plaintiffs were entitled to a substantial sum for damages caused by the negligence of the defendant in the operation of a motor vehicle.

The facts which are material respecting the accident are fully set out in the reasons for judgment of the learned trial judge. He came to the conclusion that the collision was caused by the defendant having driven his motor car on to the northerly half of the highway in question into the path of the motor vehicle occupied by the plaintiffs, which latter car, he found, was proceeding westerly on its proper or northerly side of the road. The plaintiffs had moved their car towards the centre-line of the road in order to pass a disabled motor vehicle which was standing upon the northerly part of the highway.

It was argued by counsel for the appellant that the position of this disabled car upon the road was an objective fact which had been established, and that because of its position it was impossible for the plaintiffs' motor car to have passed it without getting over on to the southerly side of the highway. On the other hand, there was the testimony of a number of witnesses that there was sufficient space between the disabled car and the centre-line of the road in which the plaintiffs' motor car passed the disabled vehicle without crossing to the south of the said centre-line. Because of the conflict in testimony the learned trial judge stated that he had given very careful consideration to the demeanour in the witness-box of the various witnesses called by both parties, and he accepted the evidence of the



plaintiffs' witnesses where it conflicted with the testimony of those called by the defendant.

Counsel for the appellant cited the statement made by Lord Wright in *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243 at 267-8, where it was said that where a judge decides on conflicting evidence there may be cases where his findings may be falsified by some objective fact. In my opinion, however, in the present case the objective fact, that is, that the disabled motor car occupied so great a part of the highway in question that it was impossible for a motor vehicle driving westerly to pass it without going south of the centre-line of the highway, was not proved to be a fact because the evidence given on behalf of the defendant as to the position on the highway of this disabled car, as well as the evidence of a witness called by the plaintiffs as to the angle of the disabled car with the north curb of the road, was not accepted by the learned trial judge. The appeal against the finding of the trial judge should be dismissed.

During the course of the trial, while one of the witnesses called on behalf of the appellant was under cross-examination by counsel for the plaintiffs, this witness stated that an insurance agent had called upon him in connection with the accident.

In respect of actions in which damages are claimed, the rule has long existed that a jury should not be informed that the defendant is insured. It has been said that the disclosure to the jury of the fact of a defendant's insurance might tend to prejudice or embarrass the fair trial of the action.

Mr. Justice Barlow interrupted the course of the trial, and counsel for the plaintiffs elected to have the trial continue before the learned trial judge without a jury; counsel for the appellant stated that he desired the case to be continued with the jury. The presiding judge continued the trial without the jury. The remaining ground of appeal in the present case, and one which was forcibly argued by Mr. Cartwright, is that the trial judge erred in not acceding to the request of the appellant, who was a plaintiff by way of counterclaim, that the trial proceed before another jury. He argued that a jury notice having been served, and the trial therefore being, under ordinary circumstances, before a jury, the right of either party to have a jury trial was paramount, and that in a case such as here

arose, where one party desired a trial without a jury and the other desired a trial by jury, the election of that party who wished a trial by jury must prevail.

Counsel for the appellant argued that the proposition stated by him was founded upon the decision of this Court, delivered by Mr. Justice Davis, in the appeal of *Fillion v. O'Neill*, [1934] O.R. 716, [1934] 4 D.L.R. 598. At the trial of that action, a witness under examination by counsel for the plaintiff testified that an insurance agent had called upon her in connection with the accident in which injuries were received for which the plaintiff claimed damages. The trial judge discharged the jury despite the protest of counsel for the plaintiff, and continued the trial without a jury. He found that the plaintiff had not made out a case of negligence against the defendant, and dismissed the action. In the reasons for judgment of Davis J.A., upon the appeal from the judgment at the trial, are to be found the following comments, at p. 727:

"It is to be observed that plaintiff's counsel was not given the right to elect either to go on with the case without the jury or to have the case stand over to proceed with another jury at the then or next sittings of the Court, . . . although plaintiff's counsel protested against his client being deprived of a trial of the issues of fact and of the assessment of damages by a jury.

"It was argued by counsel for the defendant before us that the dismissal of the jury was in the exercise of the discretion of the trial Judge and not reviewable. Without departing from the general rule that the exercise of a discretion by a trial Judge should not be interfered with except in extreme cases and giving full effect to the general application of the rule, what counsel for the plaintiff complains of is not the discharge of the jury, but the failure of the trial Judge to permit the plaintiff to elect at that comparatively early stage of the trial whether she would proceed with her case without a jury, or have it adjourned to a later date to be tried with a jury. The proper practice was left an open question in *Gowar v. Hales*, [1928] 1 K.B. 191. But it seems to me in this case (essentially a case to be tried by a jury so long as the jury system prevails) that the plaintiff was entitled to be given her election and that its denial was not an exercise of discretion by the trial Judge but a deprivation of a substan-

tial right that the plaintiff in the circumstances of this case has."

It is argued in the present case that the rule laid down in *Fillion v. O'Neill* applies as well to a plaintiff who is such by way of counterclaim.

By the provisions of s. 55 of The Judicature Act, if a party desires the trial of an action by a jury he may serve a jury notice and the trial shall proceed before a jury subject to the terms of subs. 3 of s. 55 which reads as follows:

"Notwithstanding the giving of the notice the issues of fact may be tried or the damages assessed without the intervention of a jury if the judge presiding at the sittings so directs or if it is so ordered by a judge."

The statute preserves the right of the trial judge to dispense with the jury in the exercise of his judicial discretion notwithstanding the election of a party to have the trial proceed before a jury.

A careful consideration of the passage which has been quoted from the judgment of Davis J.A. leads to the conclusion, to be gathered from the language used, that it is the election or choice by the plaintiff in the action to have the trial proceed without a jury or to have it adjourned to be tried later by a jury, which should govern and be followed by the trial judge, and not that the question should be decided as the trial judge might think proper by the exercise of his judicial discretion after being informed of the method of trial chosen by the plaintiff. If this is the correct interpretation of the judgment in the *Fillion* case, it would follow that the question of insurance being intimated to a jury is to be regarded as of such a nature that an exception is created to the general rule as to the discretion of the judge presiding at a trial.

The learned trial judge in the present case appeared to take the view that he was bound by the election of the plaintiff as is shown by his statement that: "The plaintiff who serves a jury notice has the option either of a new trial or continuing the case without a jury."

I do not think that Mr. Justice Davis based his decision, that the plaintiff is entitled to choose in what manner the action shall be tried, upon the fact that the plaintiff had served the jury notice. It seems to me that the learned judge founded his conclusion that the plaintiff was entitled to elect to have a



trial by jury if he so desired, upon the ground that the action was, as he said, "essentially a case to be tried by a jury".

The provision of the statute, placing the matter of whether a trial should be by a jury or by a judge without a jury in the discretion of the trial judge, has been the rule followed for many years. In *Wilson v. Kinnear*, 57 O.L.R. 679, [1926] 1 D.L.R. 241, the appeal was by the plaintiff from an order striking out the jury notice served by the plaintiff, and providing that the case be transferred for trial to a non-jury sittings. Counsel for the respondent took the preliminary objection that no appeal would lie from the decision of the judge who had made the order striking out the jury notice. Middleton J.A., at p. 680, said:

"In our opinion, this objection is well taken.

"In *Brown v. Wood* (1887), 12 P.R. 198, it was held that the discretion given to a trial Judge by sec. 255 of the Common Law Procedure Act could not be reviewed upon appeal, and that decision has been ever since regarded as settling the law."

In the recent appeal to the Supreme Court of Canada of *Telford v. Secord*; *Telford v. Nasmith*, [1947] S.C.R. 277, [1947] 2 D.L.R. 474, Mr. Justice Kellock comments upon s. 55 of The Judicature Act, and uses the following language:

"There rests with the trial judge sufficient power and authority to conduct the trial as it should be conducted, and, should he see reason to try the action without a jury or to dispense with the jury at any stage, his discretion is not subject to review."

In *Freedman et al. v. Reliable Motor Transport Company et al.*, [1943] O.W.N. 387, 10 I.L.R. 235, Mr. Justice Urquhart referred to the judgment in the *Fillion* case, and said that it "seemed to establish an exception to the general rule . . . that the exercise of a discretion by a trial judge should not be interfered with."

The matter under consideration is discussed at some length in the case of *Grinhan et al. v. Davies*, [1929] 2 K.B. 249, on an appeal from a judgment of a County Court Judge who had discharged a jury and ordered the case to be tried by another jury because of the mention of insurance during the course of the trial. This case appears to be the latest in England upon the subject under discussion. Salter J. in his judgment said that

in his opinion it was a settled rule of practice in cases in which damages are claimed that the jury should not be informed by or on behalf of the plaintiff that the defendant is insured, although, he added, this rule is not universal but is well established and is obviously fair. And, at p. 250, he further said:

"It is often difficult for counsel for the plaintiff to avoid letting the jury know this fact; and if he does so the circumstances will no doubt be considered by the judge in deciding what course he should adopt. But there is no doubt whatever of the existence of the rule, and it is an important one. If the rule is violated, it is no doubt a matter of discretion for the judge what course he will take. The result of the violation of the rule is that the jury, unintentionally, it may be, but in fact none the less, are prejudiced, and the judge must take such course as he thinks proper. There can be no doubt at all that the judge has a discretion to order the jury to be discharged, if he thinks that the circumstances of the case render that course the proper one. He has that power, not only by virtue of the rules of practice, but also by virtue of the much wider rule that it is the duty of a judge to see fair play between the parties and to prevent any unfair appeal to the prejudices of the jury."

Talbot J. expressed considerable doubt as to whether the rule in question was an expedient one. He said, however, that that aspect of the matter was irrelevant because the rule did exist. At p. 254, he said: "We have no right to inquire whether the county court judge acted judiciously in the circumstances."

The question is regarded as one which is within the general discretion of the trial judge.

I think that the rule as expressed by Davis J.A. in the *Fillion* appeal should be confined to cases which are in all respects similar to that case and should not be extended.

The learned trial judge does not appear to have acted upon any wrong principle in fixing the amount of damages, and I cannot find a basis upon which this Court would be warranted in disturbing his finding.

I think the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiffs, respondents: Bowlby, Griffin & Parker, Hamilton.*

*Solicitors for the defendant, appellant: Walsh & Evans, Hamilton.*

## [COURT OF APPEAL.]

## Colonial Coach Lines Limited v. Nicholson.

*Landlord and Tenant — Death of Tenant — No Grant of Probate or Administration — Widow Continuing in Possession — Rights of Parties — Notice to Quit.*

Where the tenant of property dies and, no probate or administration having been taken out, his widow remains in possession of the demised premises, she continues as her husband's successor upon the same terms, and notice to quit, which may validly be served upon her, must be such notice as would have been required if the tenant had remained alive, *viz.*, in the case of a tenancy from year to year, six months' notice terminating with the end of a year's tenancy. It is an old and well-established principle that where a person succeeds the tenant in the occupation of premises that person will be presumed to be the assign of the tenant and unless the presumption is rebutted (*e.g.*, by a subletting) notice to quit may be given to that person. *Rees d. Mears v. Perrot* (1830), 4 C. & P. 230; *Sweeny v. Sweeny* (1876), 1 R. 10 C.L. 375, applied. This rule is not in conflict with the vesting of the estate and interest of the deceased, as at the date of his death, in his personal representative when appointed.

AN APPEAL by a tenant from an order for possession.

22nd and 23rd September 1949. The appeal was heard by LAIDLAW, ROACH and AYLESWORTH JJ.A.

V. *Evan Gray, K.C.*, for the tenant, appellant: My first ground of appeal is that the proper party is not before the Court. The late Amos Nicholson was a tenant from year to year until his death in March 1948, and the notice to vacate was served on his widow, who was an occupant only. The term of years was transmitted to the administrator of the tenant's estate, but letters of administration were not granted to the widow until 1949. The landlord should have found the legal personal representative, and made the widow a party in that capacity.

The learned trial judge misdirected himself as to the consequences flowing from the respondent's occupation. He found that a tenancy had been created between her and the landlord, but no such inference can be drawn in this case, since our occupation was consistent with the circumstances existing before the tenant's death. The respondent managed the "snack bar" for her husband before his death. There is no suggestion that there was any agreement between the widow and the landlord, and the evidence is to the contrary effect. There was nothing inconsistent with a mere continuation of the existing tenancy: *Scarf v. Jardine* (1882), 7 App. Cas. 345. To displace the tenancy from year to year there must be something to indicate a change in the status of the parties: 14 Halsbury, 2nd ed. 1934,



p. 306, para. 561. An act changing status must be unequivocal and consistent only with a new tenancy.

The landlord could have applied for the appointment of an administrator, and it can serve a new notice now that an administrator has been appointed.

The notice to quit was defective since it referred to two properties, and has been held to be invalid as to one of them. It is not severable. Not only does it demand possession of all the premises, but it treats them as being the subject of a single tenancy. The Court cannot divide the good from the bad. Title and vesting are correlative terms: Williams, *Canadian Law of Landlord and Tenant*, 2nd ed. 1934, pp. 612-3; 27 Halsbury, 2nd ed. 1937, p. 647, para. 1128; 20 Halsbury, 2nd ed. 1936, p. 374, para. 452.

*G. E. Beament, K.C.*, for the landlord, respondent: There were two separate and distinct tenancies. A "personal representative" is defined in s. 1(c) of The Devolution of Estates Act, R.S.O. 1937, c. 163, and vesting in him is provided for in s. 2. The tenancy of the deceased is not relevant, unless there is evidence of a subletting to his wife in his lifetime. To determine that tenancy, the landlord would admittedly have to serve the personal representative. [AYLESWORTH J.A.: *Rees d. Mears v. Perrot* (1830), 4 C. & P. 230, 172 E.R. 683, and *Sweeny v. Sweeny* (1876), I.R. 10 C.L. 375, seem to be against that contention of the appellant.]

The respondent here acted for herself. The law is clear that where a person with no enforceable lease pays rent monthly there arises a monthly tenancy: *Semi-Ready Limited v. Tew* (1909), 19 O.L.R. 227, 237; *Tom Gung et al. v. Fong Lee* (1914), 48 N.S.R. 317, 22 D.L.R. 809. If Mrs. Nicholson, at the date of the notice, had not paid the rent, could we not have sued her personally for it? She surely could not be liable on the covenants in a lease to which she had no privity, unless she were estopped from denying that she was an assignee. As to the sufficiency of the notice, if, as found by the trial judge, it was a monthly tenancy, then the notice was sufficient.

It is true that the notice to quit covered two properties, one being living quarters and the other the "snack bar", where there was a tenancy by implication of law: Williams, *op. cit.*, p. 493, s. 119. There were two separate accommodations and the notice

was "double-barrelled". The test is not subjective, but is related to the tenant's position: Was the tenant misled by the notice? 20 Halsbury, 2nd ed. 1936, p. 137, para. 146; *Dick v. Sarchuk*, [1944] 1 D.L.R. 683.

*V. Evan Gray, K.C.*, in reply: There cannot be two inconsistent tenancies. The nature of our occupation after the death of the tenant might have been that of an executor *de son tort*, responsible to the heirs: *Charles J. Ellison Limited v. Murray*, [1949] O.W.N. 398.

*Cur. adv. vult.*

18th October 1949. The judgment of the Court was delivered by

AYLESWORTH J.A.:—The tenant appeals from the order pronounced by His Honour Judge C. W. A. Marion, in the County Court of the County of Carleton, on 30th May 1949, in so far as the same directed the issue of a writ of possession in favour of the landlord with respect to the premises known as 277 Albert Street in the City of Ottawa.

These premises are commercial premises which were leased to the late Amos Nicholson for one year on 1st October 1938. The deceased had there carried on the business of running a so-called "snack bar" and after his death on 27th March 1948 his widow, the appellant, continued to carry on this business and continued to pay the same rental for the premises monthly. Upon 22nd November 1948 a notice was served upon the widow demanding possession of these premises and also other premises occupied by her as housing accommodation on 30th April 1949. The order appealed from dismissed the landlord's application for possession of the premises occupied as housing accommodation and no question arises in this appeal with respect thereto.

The trial judge properly found that the deceased Nicholson was at the time of his death a tenant from year to year, having held over under the lease to him, to which reference has already been made, but he also found that "the landlord chose, unconsciously no doubt but effectively, to deal with Mrs. Nicholson in her own right and not *quoad* the estate of the late Nicholson irrespective of any possible dormant or inchoate right of the estate to the leasehold term", and that following Nicholson's death "the tenant herein remained in possession in her own right and not in

any representative capacity; she paid rent to the landlord which accepted it, and in my opinion the relationship of landlord and tenant was thereby created as between Mrs. Nicholson in her own right and the Colonial Coach Lines Limited", and, "I find that the tenancy thus created was on a monthly basis and that the notice, in relation to premises 277, served upon the tenant last November was a good and sufficient notice to determine the tenancy of these premises on the 30th of the month of April, 1949".

Admittedly nothing was done by the appellant which was inconsistent with the continuation of the tenancy enjoyed by her late husband. Counsel for the respondent frankly stated that the trial judge's finding as to the creation of a new tenancy between respondent and appellant and upon a monthly basis could be supported only "by implication of law".

This ignores the old and now well-established principle that where a person succeeds the tenant in the occupation of premises, that person will be presumed to be the assign of the tenant and that unless the presumption is rebutted, as for example by a subletting, notice to quit may be given to that person: 20 Halsbury, 2nd ed. 1936, p. 139. In *Rees d. Mears v. Perrot* (1830), 4 C. & P. 230, 172 E.R. 683, it was held that a landlord who duly served notice to quit upon the widow of a tenant who remained in possession after the tenant's death was entitled to recover possession unless it were shown that some person other than the widow was the executor or administrator of the tenant, and that it was not incumbent on the landlord to show that the widow was either executrix or administratrix. In *Sweeny v. Sweeny* (1876), I.R. 10 C.L. 375, a tenant from year to year died intestate and no administration being taken out, his widow continued in possession and paid the rent; the majority of the Court, Fitzgerald B. dissenting, held that the service of a notice to quit on the widow, the person in possession, was sufficient, in the absence of a legal personal representative of the deceased tenant, to determine the tenancy which had been in him and was effectual for such determination even as against the legal personal representative subsequently raised. Both these authorities are cited with approval in Woodfall's Law of Landlord and Tenant, 24th ed. 1939, pp. 967 and 1104, and a perusal of the judgments, particularly the able and exhaustive judgment of Palles C.B. in the *Sweeny* case,



establishes beyond doubt that the ratio of the judgments is in no sense in conflict with the vesting of the estate and interest of the deceased as at the date of his death in his personal representative when appointed.

Here the trial judge has properly found a tenancy from year to year in Nicholson, deceased, and that properly to determine that tenancy six months' notice expiring on 30th September in any year would have to be given. After the death of her husband the appellant continued in possession as his successor upon the same terms as her husband before her and as no effective notice to terminate the tenancy from year to year was served upon her, the landlord fails.

The appeal will, therefore, be allowed with costs and the order below directing the issue of a writ of possession in favour of the landlord will be set aside. Had it not been for the erroneous view of the law adopted in the court below, the tenant, in the first instance, would have succeeded altogether and not merely as to the notice given to her purporting to deal with the housing accommodation. As the learned trial judge apparently refrained from awarding costs one way or another because success was divided between the parties in the view he took of the matter, I see no reason why the appellant should not also have her costs of the application in the court below and an order will go dismissing that application also with costs.

*Appeal allowed with costs throughout.*

*Solicitors for the landlord, respondent: Beament, Fyfe & Ault, Ottawa.*

*Solicitors for the tenant, appellant: Gauvreau, Burrows, Devine & McGovern, Ottawa.*

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[COURT OF APPEAL.]

Clow et al. v. Tracey.

*Negligence—Dangerous Premises—Invitor and Invitee—Extent of Premises Covered by Invitation—Luncheon Guest at Hotel Using Upstairs Bathroom—Contributory Negligence—Applicability of The Negligence Act, R.S.O. 1937, c. 115.*

The Negligence Act applies to an action by an invitee against an invitor for damages arising out of the dangerous state of premises occupied by the defendant, and the negligence of the plaintiff is accordingly not a complete bar to such an action, based upon the principles laid down in *Indermaur v. Dames* (1886), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311. *Greisman v. Gillingham*, [1933] O.R. 543 at 564, affirmed *sub nom. Gillingham v. Shiffer-Hillman Clothing Manufacturing Co.*, [1934] S.C.R. 375 at 386, applied; *Whitehead v. The City of North Vancouver* (1937), 53 B.C.R. 512, referred to; *Pfister v. Toronto Transportation Commission*, [1946] O.R. 328, discussed.

The female plaintiff, having lunched with her husband at the defendant's hotel, went to a bathroom on the second floor of the hotel. There was a washroom on the ground floor, available for members of both sexes, but there was no evidence that the female plaintiff was aware of the existence of this washroom, although her husband (the male plaintiff), who had stayed at the hotel on previous occasions, knew of it. The female plaintiff was injured in leaving this bathroom as the result of what the trial judge found to have been an unusual danger. The trial judge also found the female plaintiff guilty of contributory negligence, and there was no appeal against this finding. Held, the trial judge's findings of fact being supported by the evidence, the plaintiffs were entitled to judgment for a proportionate part of their damages. The plaintiffs were obviously invitees in the hotel so far as lunch was concerned, and the invitation should be held to apply also to the upstairs bathroom. The washroom on the ground floor was admittedly not a proper place for use by the female plaintiff, and there was nothing to indicate that the upstairs bathroom was for the use of house guests only or that it was private. In the circumstances the female plaintiff had a right to go to that part of the premises where she was injured, and was an invitee at that place.

AN APPEAL by the defendant from the judgment of Urquhart J., [1949] O.W.N. 384, in favour of the plaintiffs. The facts are stated in the reasons for judgment.

12th October 1949. The appeal was heard by LAIDLAW, HOPE and AYLESWORTH JJ.A.

K. G. Morden, K.C., for the defendant, appellant: No question of credibility is involved in this appeal, and this Court is in as good a position, *e.g.*, as to whether or not this step constituted an unusual danger, as the trial judge, since the question is a mixed one of fact and law. I submit that it was not an unusual danger: *Bay-Front Garage, Limited v. Evers et al.*, [1944] S.C.R. 20, [1944] 1 D.L.R. 433, overruling *Lennie v. The Township of Etobicoke*, [1943] O.W.N. 622.

The female plaintiff was not an invitee at the place where the accident occurred. There was a washroom on the ground floor,

and the bathroom upstairs, to which she went, was intended only for over-night guests. No servant or employee directed her there. The bathroom might have been perfectly safe for someone living in the hotel: *Walker v. Midland Railway Company* (1886), 55 L.T. 489 at 490; *Knight v. Grand Trunk Pacific Development Co.*, [1926] S.C.R. 674, [1927] 1 D.L.R. 498.

The plaintiff's own negligence, found by the trial judge, is not a mere matter for contribution under The Negligence Act, R.S.O. 1937, c. 115, but is an absolute bar to her right to recover. The rule in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311, is in terms founded upon the plaintiff taking reasonable care for his own safety: *Newton v. City of Brantford* (1910), 1 O.W.N. 965, 16 O.W.R. 555; *Kester v. The City of Hamilton*, [1937] O.R. 420 at 422, [1937] 2 D.L.R. 330. [AYLESWORTH J.A. referred to *Wasmund and Wasmund v. Smith*, [1947] O.R. 181, [1947] 2 D.L.R. 637.]

*D. J. Watt, K.C.*, for the plaintiffs, respondents: The mere forgetfulness of this woman, having once negotiated the step, does not necessarily defeat her right to recover: *Keech v. Town of Smith's Falls* (1907), 15 O.L.R. 300. She was taking reasonable care, which was all that she was obliged to do, and there was a failure on the defendant's part to warn her of the step.

The Negligence Act applies to all actions based on negligence. The *Lennie* case, *supra*, had facts almost identical with these. *Blair v. City of Toronto* (1927), 32 O.W.N. 167, is referred to in *Cousins v. Loblaw Groceries Ltd.* (1927), 33 O.W.N. 182. The trial judge in this respect followed *Greisman v. Gillingham*, [1933] O.R. 543, [1933] 3 D.L.R. 134, affirmed *sub nom. Gillingham v. Shiffer-Hillman Clothing Manufacturing Co.*, [1934] S.C.R. 375, [1934] 3 D.L.R. 472. *Wasmund and Wasmund v. Smith*, *supra*, is distinguishable on its facts, and in *Kester v. The City of Hamilton*, *supra*, there was an entire lack of care. It is suggested in *Stowell v. Railway Executive*, [1949] 2 All E.R. 193, that the test may be whether this was a danger which was unusual with respect to this plaintiff.

The onus was on the defendant to show that she had not created a danger, and she did not discharge that onus.

*K. G. Morden, K.C.*, in reply: The *Stowell* case, *supra*, relates to knowledge rather than to physical capacity. This was not a concealed danger, nor was it a danger to a person exercising



reasonable care for his own safety. In *Brown and Brown v. B and F Theatres Limited*, [1947] S.C.R. 486, [1947] 3 D.L.R. 593, the premises practically constituted a trap.

The only way of reconciling the cases on the liability of invitees is to decide whether or not there was an unusual or concealed danger in respect of a person using reasonable care: *Danluck v. Birkner et al.*, [1947] S.C.R. 484, [1947] 3 D.L.R. 337.

*Cur. adv. vult.*

20th October 1949. The judgment of the Court was delivered by

LAILAW J.A.:—This is an appeal by the defendant from a judgment of Mr. Justice Urquhart dated the 20th April 1949.

The action was brought to recover the loss and damages sustained by the respondents by reason of personal injuries to the female respondent when she fell on premises owned and occupied by the appellant. The material facts of the case are not in dispute. The respondents were travelling through the village of Winchester and decided to stop at the appellant's hotel for lunch. After they had lunch in the dining-room on the ground floor of the hotel, the female respondent went to a bathroom on the second floor. When she was leaving there to return to her husband, who was waiting for her on the ground floor, she fell at a step at the bathroom door. The step is about five inches in height, and in leaving the bathroom one steps down from the level of the bathroom floor to the floor of a corridor. At the time the female respondent fell, the bathroom was bright and sunny and the corridor was dark in comparison. There was no window in the corridor and no direct natural lighting of it. The only natural light reaching it came through transoms of a number of bedrooms leading from it. It was necessary to have an electric light burning in the corridor both day and night. That light is located in the corridor ceiling about three feet from the bathroom door. The learned trial judge finds that it was burning at the time of the accident. There were no warning signs of any kind to indicate the presence of the step at the door of the bathroom or of any danger at that place. In addition to the bathroom as described, there is a washroom on the ground floor of the hotel. It is entered from a hall adjoining the dining-room, and there is a door just opposite the washroom leading from the

hall into the dining-room. The door of the washroom is marked "Guest's Toilet", and the appellant stated in evidence that the room is "for the public". There were two toilets in that washroom, and the room was available to and used by both sexes although the appellant stated that she knew that was not proper. The female plaintiff had no knowledge that there was a washroom on the ground floor of the hotel, and followed the directions of her husband in going to the bathroom on the second floor. He had previously stayed at the hotel on many occasions and knew the location of the bathroom to which he directed his wife.

The learned trial judge found that the female respondent "might reasonably have been supposed to use the upstairs washroom, which was open to the public, and that she went there in the belief, reasonably entertained, that she was entitled or invited to go there". He held that she was "in the position of an invitee and the principles applicable to invitees apply". He refused to accept the argument of counsel for the appellant "that the step here was not an unusual danger". He expressed the opinion that: "Not only the step itself, but the fact that the washroom door was flush with the top of the step, combined with the fact that the corridor, while not exactly dark, was dark in contrast with the brighter washroom, made it, in my opinion, necessary that there should have been a sign warning people of the step and of the duty to take care for their own safety." The learned trial judge discussed the law as stated by Willes J. in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 288, affirmed (1867), L.R. 2 C.P. 311, and in *Walker v. Midland Railway Company* (1886), 55 L.T. 489. He considered the effect of The Negligence Act, R.S.O. 1937, c. 115, and amendments thereto, upon the principles of law stated in *Indermaur v. Dames*, *supra*, and following cases, and decided that "the decisions as to the consequence of the plaintiff's negligence must be read so as to conform to the change in the Common Law effected by that Act". In support of his opinion he referred to *Whitehead v. The City of North Vancouver* (1937), 53 B.C.R. 512, [1939] 1 W.W.R. 369, [1939] 3 D.L.R. 83; *Griesman v. Gillingham*, [1933] O.R. 543, [1933] 3 D.L.R. 134, affirmed *sub nom. Gillingham v. Shiffer-Hillman Clothing Manufacturing Co.*, [1934] S.C.R. 375, [1934] 3 D.L.R. 472.

The finding of contributory negligence on the part of the female respondent and the quantum of damages are not matters in controversy in this appeal. The grounds of the appeal, as they appear in memorandum filed by counsel on behalf of the appellant, are that the learned trial judge erred in: "(a) finding the step constituted an unusual danger; (b) failing to find that the female plaintiff knew or should have known of the existence of the step; (c) finding that the female plaintiff was an invitee on that part of the premises where she fell."

Upon the hearing of the appeal it was urged also that the facts of this case fall squarely within the principle of law stated by Willes J. in *Indermaur v. Dames, supra*; that by reason of the contributory negligence of the female respondent there is no breach of duty owing in law by the appellant to her; and that in the circumstances the principles of law properly applicable to the case are not affected by the provisions of The Negligence Act.

I think the finding of the learned trial judge that there was an "unusual danger" at the place of the accident is one of fact which could be properly made from the evidence and is fully supported thereby. The learned judge referred to physical conditions which satisfy me that there was an existing danger at the doorway of the bathroom which might be properly described as unusual. It continued to be such even though the female respondent entered the bathroom only a short time before the accident. Nor is the fact that there was an unusual danger at the place of the accident altered in any way by the fact that there was neglect on her part to use reasonable care for her own safety. The finding from the evidence that the appellant did not use reasonable care to prevent damages from unusual danger, of which she knew or ought to have known, is nevertheless a proper one, and I think the Court should not interfere with it.

Counsel for the appellant contends that the learned trial judge should have found that the female respondent "knew or should have known of the existence of the step". Of course when she entered the bathroom she had to step up from the corridor floor to the floor of the bathroom and consequently had knowledge of a kind that there was a step at the doorway, but obviously that knowledge did not sufficiently impress the fact of the existence of the step on her mind as to cause her to look for the step when she was leaving the room. Her failure to remember the step and



to keep a proper look-out for it constitutes contributory negligence on her part in respect of which she does not appeal to this Court, but again the failure to find that she should have known of the existence of this step does not affect or in any way alter the finding of fact that there was an unusual danger at the place of the accident.

The finding that the female respondent was an invitee in that part of the premises where she fell requires consideration of the question of her right to be there. She was a guest for lunch at the hotel, and her husband had paid the charge made by the proprietor for that service. She was on the hotel premises at the invitation and in the ordinary course of business carried on by the proprietor. The proprietor anticipated that business visitors to her hotel might reasonably expect to find toilet facilities there. While one such facility was provided on the ground floor of the hotel, it was admittedly not a proper place for use by the female respondent. Even if she had known of its existence, she could not reasonably be expected to use it. Indeed I venture to think that if the proprietor herself had been asked for directions, she would have directed the female respondent to the bathroom on the second floor. There was nothing to indicate that the use of that bathroom was for house guests only or that it was private in nature. I think that in the circumstances the female respondent had a right to go to the part of the premises where she was injured, and that she was an invitee at that place. The finding of the learned trial judge was right, and the attack made upon it by counsel for the appellant fails.

While neither the notice of appeal nor the memorandum of law filed on behalf of the appellant explicitly raises the point that The Negligence Act is not applicable in the circumstances of this case, nevertheless that question was argued at length on the hearing of the appeal. I entertain no doubt as to the proper answer to the question. I think it was definitely and finally settled in *Gillingham v. Shiffer-Hillman Clothing Manufacturing Co.*, *supra*, referred to in other respects by the learned trial judge. In the judgment of the Court of Appeal of this Province, Latchford C.J., at p. 562 of [1933] O.R., states that the classical judgment of Willes J. in *Indermaur v. Dames*, *supra* "has ever since been recognized as a declaratory of the law". At p. 564, the opinion of the Court is stated as follows:

"Mere contributory negligence is not now in this province a bar to the right of a plaintiff to recover damages."

Hughes J., in delivering the judgment of the Supreme Court, at p. 386 of [1934] S.C.R., says in unqualified language:

"... we agree with the Court of Appeal that the contributory negligence of the plaintiff was not a bar to his right to recovery in the Province of Ontario."

The learned trial judge referred also to *Whitehead v. The City of North Vancouver*, *supra*, and in the judgment of Macdonald J.A. in that case may be found a learned and complete discussion of the question presently before the Court. I give full effect to the judgment in the *Gillingham* case, and hold that The Negligence Act applies to an action by a negligent invitee against a negligent occupier of premises.

Counsel for the appellant referred in particular to *Pfister v. Toronto Transportation Commission*, [1946] O.R. 328, [1946] 3 D.L.R. 71, 59 C.R.T.C. 289, but it is apparent at once on examining that case that the question now under discussion did not there arise for decision. It was there held that the jury's findings had impliedly exonerated the defendant of all negligence which had been alleged in the statement of claim, and there was nothing in the evidence to support the conclusion that the matters which had been found as negligence contributed in any way to the accident, or that they constituted negligence in law. Mr. Justice Hogg, at p. 340, stated plainly that: "No negligence in law has been found against the appellant, and therefore there is no question of damages being apportioned between the parties." The judgment of this Court in that case is not applicable to the facts and findings in the present case.

My conclusion and opinion is that this appeal fails on all grounds advanced on behalf of the appellant and should, therefore, be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitor for the plaintiffs, respondents: G. Albert Beale, Brockville.*

*Solicitor for the defendant, appellant: R. P. Milligan, Cornwall.*

## [COURT OF APPEAL.]

**Rogers v. Holman.**

*Negligence—Owner of Beach Charging for Admission of Automobiles  
—Whether Precautions to be Taken to Protect Swimmers.*

The defendant owned a tract of land on the north shore of Lake Erie, bounded by the high water mark. He built a road across his property, giving access from the public highway to the beach, and charged a fee for all persons using the road with motor vehicles. Many other persons used the beach, arriving either on foot or by bicycle, and not necessarily by the road, and no fee was charged to such persons. The plaintiff's husband, having gone to the defendant's land with a party for a picnic, was drowned when a sudden storm came up while he was swimming. He had visited the property, and swum there, on several previous occasions. The widow sued for damages, basing her claim principally upon the contention that the defendant had been negligent in not providing life-guards and life-saving equipment at the beach at the time.

*Held*, the action must fail. The relationship of invitor and invitee was not established, in so far as the waters of the lake were concerned. The waters were open to the public and the deceased, having come lawfully upon the defendant's land, required no licence from the defendant to enter the lake and swim there, nor did the defendant assume to grant any such licence. *Drinkwater v. Morand* (1929), 64 O.L.R. 124, discussed. Still less could there be implied any representation or warranty on the defendant's part that it was safe for such a person to swim in the lake at this location. The fact that the defendant did maintain guards and equipment during certain hours (not including the time at which the deceased lost his life) was not a recognition by him of a duty to provide such protection, but was rather an indication of his desire to maintain the good name of property in which he had invested a large sum of money. Further, it did not appear that the defendant had any knowledge not shared by the deceased (who was familiar with the beach and with the waters there) of any dangers to be encountered in swimming in the lake on this occasion.

AN APPEAL by the plaintiff from the judgment of Smily J., dismissing the action.

5th October 1949. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and AYLESWORTH JJ.A.

*G. T. Walsh, K.C.* (*A. L. Brooks, K.C.*, with him), for the plaintiff, appellant: Our case has a twofold basis. We frame it first in negligence, and secondly on the breach of an implied warranty by the defendant in the operation for profit of his swimming resort. There is an obligation on the proprietor of a public bathing beach to provide safeguards, and there is an implied contract to use reasonable care for the safety of persons using the beach. There was an invitation here by the defendant to other persons, including the deceased, to use public waters, and there was a corresponding duty to warn of the undertow and to supply safety devices: *Drinkwater v. Morand*, 64 O.L.R. 124, [1929] 4 D.L.R. 421. [AYLESWORTH J.A.: That case was



considered by this Court in *MacDonald v. The Town of Gcderich et al.*, [1949] O.R. 619, [1949] 3 D.L.R. 788, where it was pointed out that the words of Middleton J.A. in the *Drinkwalter* case were obiter.]

The Courts in forty of the United States of America have adopted the principle of implied warranty. There is no limitation of liability on the ticket, except as to the car and contents. The defendant knew of the undertow, and of another drowning there. The duty here is even higher than that owed to an invitee. There was an entire absence of protective measures, and the absence of such measures was the proximate cause of the casualty. The defendant had the last opportunity to avert the fatal accident and his neglect to provide facilities for rescue was the direct and proximate cause of the accident. The deceased was not guilty of contributory negligence in the circumstances, since he was attempting to rescue his son.

We do not say that the defendant was an insurer, but he was bound to make his resort as safe as reasonable care and skill could make it. His invitation extended to the use of the lake, and having issued such an invitation he must provide adequate means for the protection of those who accept his invitation. These people were there for the defendant's gain and profit.

We refer to *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501 at 503; 62 Corpus Juris, 1933, pp. 863-871; *Larkin v. Saltair Beach Co.* (1905), 30 Utah 86, 83 P. 686, 3 L.R.A. (N.S.) 982; *Lipton v. Dreamland Park Company* (1939), 121 N.J. 554.

*E. L. Haines, K.C.*, for the defendant, respondent: To make out a case, the plaintiff must obtain a finding of fact that there was an unusual danger: *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, affirmed L.R. 2 C.P. 311. Here, however, the trial judge has specifically found that there was no unusual danger, and that finding should not be interfered with. The deceased could swim only about 50 feet, and he had been all over this beach only a few days before. He knew the conditions prevailing, both as to the beach and as to the water, and he also knew the hours during which life-guards were in attendance. He was under a duty to use reasonable care for his own safety: *The Moorcock* (1889), 14 P.D. 64.

If the Court is to impose an implied obligation, it will impose only that which is least onerous: *Reid v. Town of Mimico*, 59

O.L.R. 579, [1927] 1 D.L.R. 235. There is no law that says that we must render personal services. We make no attempt to charge all who come to the beach, but only those who use our private road.

There is nothing to indicate any causal connection between the absence of life-guards and the fatality. Men did appear and go to the assistance of the deceased, and they were experts and did everything that could have been done, but were unable to save the father.

*G. T. Walsh, K.C.:* The boy was saved, and if there had been a life-guard in attendance the deceased also would have been saved. The trial judge does not find on this point.

*Cur. adv. vult.*

21st October 1949. ROBERTSON C.J.O.:—This is an appeal by the plaintiff in the action from the judgment of Smily J., dated 25th November 1948, on the trial of the action before him without a jury at Welland, whereby he dismissed the action with costs.

The appellant is the widow of the late Carlyle S. Rogers. They resided in the city of Buffalo, in the State of New York. The action arises from the accidental drowning of Carlyle S. Rogers in the waters of Lake Erie, in front of the respondent's property, known as Elco Beach, in the township of Humberstone, in the county of Welland, Ontario.

Respondent's property at this place comprises some 235 acres on the north shore of Lake Erie, and extends only to the high water mark of the lake. A sand beach on respondent's property extends along the lake front for one-half a mile. The property is mainly in a state of nature, but the respondent has constructed upon it a roadway about three-quarters of a mile long, that gives access for motor vehicles from the public highway to the beach. On the beach there are a few buildings, such as bath-houses and a refreshment stand.

The beach attracts large numbers of people in the summer time. There is evidence that at times as many as 500 cars may be found there, with several hundred people. The respondent makes a charge of 20c. for each adult person entering his property by motor car, for the use of the road he has built. In exchange a ticket is issued bearing the following words:

## "ADMISSION TICKET"

"This ticket entitles you to enter all three beaches

SHERKSTON QUARRY (The Quarry with the Sandy Beach)

ELCO BEACH (Drive to the Lake)

EMPIRE BEACH (Picnic Grounds)

*Not responsible for damage or loss to cars or contents.*

THANK YOU

COME AGAIN".

On the morning of the 10th August 1946 the appellant's husband took her and their son, aged 12 years, and some friends, in his motor car from Buffalo to Elco Beach. They arrived at the beach at about 11 o'clock, paid the usual entrance fee and were given tickets. Soon after their arrival the appellant's husband, accompanied by his son and two or three of their friends, changed into bathing-suits and entered the waters of Lake Erie. The appellant and others of their party remained seated in the motor car. The party had come intending to picnic on the beach. They came in the forenoon as there would be fewer persons there and they would be able to choose a good location at which to park their car and have lunch.

The waters of the lake were quiet at the time, but not long after the party had entered the water a sea arose, and, the wind changing, the waters of the lake became rough. For so large a lake, Lake Erie is shallow, and a considerable sea will arise very quickly. Appellant's husband could swim, but he was not an expert swimmer. Appellant, who had often been swimming with him, puts the distance he could swim at fifty feet. In some effort to assist his son, who was having difficulty in making towards shore after the water had become rough, he himself got into trouble. The evidence indicates that they were both caught in an undertow, which carried them into deeper water. No help was immediately available and by the time help arrived only the boy was above water, and he was got safely to shore. The appellant's husband had disappeared beneath the waters of the lake. The body was recovered and brought to shore within ten or fifteen minutes, and efforts were made to resuscitate him, but without success.



The action was brought to recover damages from the respondent for alleged negligence. The statement of claim alleges negligence on the part of the respondent in the following particulars:

“(a) He knew or ought to have known that the waters of Lake Erie off Elco Beach were dangerous for swimmers and neglected to warn the said Carlyle S. Rogers of such dangers, either verbally or by means of signs.

“(b) He failed to provide life guards or other attendants, life ropes, life savers, rafts or other safeguards, ordinarily furnished on bathing beaches.

“(c) He failed to warn by guards or notices of the danger of an undertow at that portion of the beach where the plaintiff's husband was drowned.

“(d) He failed to provide the proper appliances for resuscitating persons using the beach and in need thereof.”

Except as appears in the above-quoted clauses (a) and (c), the statement of claim contains no allegation that the waters of Lake Erie off Elco Beach were dangerous. There is no allegation that the deceased was not familiar with the waters of Lake Erie at this location, and aware of any danger there might be to persons swimming there. Specifically, there is no evidence of the presence at this beach of any conditions unusual to the beach in question or to Lake Erie beaches generally with respect to the creation of an undertow. The evidence of the appellant herself establishes that she and her husband (now deceased) had, some years before, been accustomed to go to this beach to swim, and that earlier in the week in which her husband was drowned there, they had again been swimming there and had explored the whole place. There is always the possibility of drowning in any water that is deep enough to swim in, and the chance of being drowned is usually greater if the water is rough. It is not suggested that the respondent should or could have done anything to alter the physical character of the location in any material respect, so that any possible element of danger would be removed or lessened. There is no evidence that the deceased was not fully aware of any risks that he ran in remaining in the lake in rough water. In fact, the evidence of his companion, Robert Metzger, indicates that the deceased had some apprehension of danger when the lake became rough, and suggested that they had better go in.

Appellant's counsel, on the argument of the appeal, did not rest his case upon matters of this kind, nor contend that respondent was in any way responsible for their presence. His argument was that there being present some element of danger, especially when the water became rough, the respondent owed a duty to the deceased to provide life-guards or other attendants to give warning of danger and to give assistance to persons who might be in trouble in the water, also to provide boats and other equipment for use on such occasions, and to have in attendance persons expert in resuscitating persons who might be overcome.

It appears by the evidence that the respondent did provide guards to attend on the beach for the purpose of giving service of the kind referred to, and that some life-saving equipment was also provided. The guards were in attendance, however, only from 12 o'clock noon until 6 o'clock p.m. The equipment provided was in charge of the guards. The respondent, in his evidence, explains that very few persons indeed came to the beach before noon. It appears from the evidence that there were on the occasion in question only a few cars on the beach, and not many people. It was not yet noon. The appellant, in her evidence, says that when they arrived there were only eight or ten other cars there. They had gone early for the express purpose of choosing a desirable location on the beach before the crowds arrived. The appellant knew nothing of the presence of guards on the beach at any time, and there is no evidence that her husband gave that matter any attention.

It appears further, from the evidence, that commonly many persons came to the beach who did not come in motor cars and pay a fee and acquire a ticket. It was not uncommon for persons to come on bicycles or to walk along the shore from neighbouring beaches. Only those who came in motor cars, using the road constructed by the respondent, were asked to pay and were given a ticket, such as I have already referred to. Persons who entered in some other manner were not disturbed, and all had the same free use of the beach and of the lake.

Appellant's counsel cited certain dicta in the judgment of Mr. Justice Middleton in *Drinkwater v. Morand*, 64 O.L.R. 124, [1929] 4 D.L.R. 421, as stating the legal principles which, in his

submission, were applicable to this case. In the case cited, the defendant owned a strip of land fronting upon Lake St. Clair. His title was to the water's edge and immediately adjacent was a sandy beach. A notice was posted at the post office in a neighbouring village, reading as follows: "Bathing Beach, Camping Grounds for rent. Apply Postmaster." Nearer the defendant's land were signs on posts: "To the Camping Grounds", "To the Picnic Grounds", "Parking in here 25c. per car".

The plaintiffs, with their infant child, went to the picnic grounds and parked their car and paid 25c. The child went wading in shallow water near the shore, with other children, and some time later, when the children were summoned to go home, the child was missing and could not be found. Two days later his body was found in a channel in front of neighbouring lands. How the body came to be where it was found was not shown. The County Judge before whom the action was tried found the owner of the land liable for damages. An appeal from this judgment by the owner of the land was allowed and the action was dismissed. After a reference to certain reported decisions, Mr. Justice Middleton proceeded as follows:

"The principle thus established is that those who invite another to use the property of a third person or of a public body impliedly warrant that the place to be used is safe for the purposes indicated, and the invitation imposes a duty upon those who invite, to make sure that it is fit for the purposes suggested.

"This, however, falls far short of making the invitor liable as an insurer of safety, the true measure of the liability being indicated by the scope and nature of the invitation.

"I accept what was said by Lord Chancellor Cave in *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, at p. 260, as indicating the limitation upon the extent of the duty undertaken:—

" 'It was not to give him absolute protection in whatever part of the appellants' premises he might be found, but only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation; and this duty must be limited . . . to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so.' "



"These words are, in my view, as applicable to the property of third persons to the use of which an invitation has been extended."

Mr. Justice Middleton then pointed out why, on the facts of the case then in hand, the principle he had stated could not be applied, the child having been permitted to stray from the perfectly safe beach in front of the picnic ground to a danger in front of adjacent premises, to which the invitation could not, by any stretch of the imagination, extend. The Court did not decide, nor did Mr. Justice Middleton say, that the defendant owner was to be deemed to have invited those who came upon his land, on payment of a fee, also to enter the waters of the lake. All that was decided was that, assuming there was such an invitation, a case of liability on the part of the invitor had not been made out.

In the present case I am of the opinion that the relationship of invitor and invitee, in so far as the waters of Lake Erie are concerned, was not established. The waters of the lake are open to the public. The appellant's husband, having come lawfully upon the respondent's land fronting upon the lake, required no licence from the respondent to enter the lake and to swim there, nor did the respondent assume to grant any such licence. Still more difficult would it be to imply a representation or warranty on the part of the respondent that it was safe for such a person to swim in the lake at this location. The principle upon which an implied term may be added to the contract between the parties, that is, that such licence must be implied to give business efficacy to their agreement, can have no application here. Having, by the respondent's licence or invitation, gone upon respondent's lands that bordered the lake, the deceased required no licence from anybody to go into the lake, nor did the respondent invite him to do so. That was left wholly to the deceased to determine.

It is also of some significance, and it is plain from the evidence, that all persons who came by the respondent's road to spend some time upon Elco Beach, did not come to swim in the lake. The appellant herself is one such person. The beach had its attraction as a pleasant place. The respondent assumed no duty with regard to the fitness of the persons who entered his property, to enter the lake also. No doubt, many could not swim

or were poor swimmers. He was not concerned with their ability to swim, nor had he any means of determining who were well able to take care of themselves in the water and those who were not.

There is no evidence that the appellant or her husband in any way looked to the respondent for supervision or action in any respect in so far as swimming in the lake was concerned. The appellant's husband chose the place where he would go into the lake and determined his own conduct thereafter, without desiring or expecting, so far as the evidence discloses, any guidance or supervision on the part of the respondent. All this he had a perfect right to do, without invitation or licence from the respondent. The respondent, therefore, does not come within the principle of the cases cited by Mr. Justice Middleton in his judgment in the case of *Drinkwalter v. Morand, supra*.

Even if a conclusion favourable to the appellant were reached on the matter of invitation to enter the lake, the appellant would have some distance further to go to make out the case put forward in argument. Upon the evidence it would be difficult to reach the conclusion that the respondent had knowledge, that the appellant's husband did not have, of any dangers to be encountered in swimming in the lake on this occasion. The appellant and her husband had known this part of the lake as a place for swimming for a number of years, and before the respondent owned the beach. They had, according to the appellant, given it a thorough inspection only a few days before the fatal accident. The respondent had acquired the property only the year before. There is no evidence of the occurrence of earlier incidents at this point that would have served as notice to the respondent of danger to swimmers, although the number of persons coming to the beach at times ran into the hundreds. The respondent did employ two guards. No inference is to be drawn from the presence of the guards during certain hours, that the respondent recognized a duty to provide such protection. It may have been nothing more than a reasonable precaution that a prudent man would take to preserve property in which he had invested a large sum from acquiring a bad name through the recklessness or folly of his visitors.

It is in evidence that persons came to this place to swim at all hours of the day, and sometimes at night. It would be a novel, and at the same time a serious, burden to impose upon the owner of such a parcel of land, to hold that he must, at all times of day or night, maintain guards to caution and superintend the conduct of the persons who came to swim at his place. It is not irrelevant in this connection to note the fact that the guards, who were provided at the hours when the crowds were the greatest, were there for the protection not only of those who came by motor car and paid a fee, but equally for the protection and care of all who entered otherwise and without payment of a fee. The guards could not distinguish the one class from the other and gave their services to all alike. This, I think, was intentional on respondent's part, and supports the view that he provided guards not because of any legal obligation to some of those using his property, but because of his desire to maintain the good name of his property, and to save lives, regardless of legal obligation.

This whole suggestion of the liability of a person in the position of the respondent to supply life-guards and boats and life preservers is in fact an attempt to apply principles that may be applicable in cases where private swimming-pools are kept, or properties privately owned are developed and managed as swimming places affording safety to those who use them and pay for the services they get. There are to be found in the reports of many of the American States cases of this latter kind, to a number of which we have been referred. In principle I think they are easily distinguishable from the present case.

I would dismiss the appeal with costs.

HENDERSON J.A.:—An appeal from the judgment of Mr. Justice Smily, of 25th November 1948, dismissing the action.

The respondent is the owner of 235 acres of land on the north shore of Lake Erie. The land is in a state of nature. Along the east end of the north shore is a stretch of sand half a mile in length known as Elco Beach. The respondent's title ends at the high water mark. No attempt is made to charge persons who use the beach and come on to it from adjoining property or beaches, but the defendant has built a road three-quarters of a



mile long across this property, so that those who wish may drive their motor vehicles on to the beach. This road provides the only access for motor vehicles. The defendant charges 20c. per adult in each motor vehicle for the use of the road. For the same charge use may be made of another beach known as Empire Beach and an old quarry known as Sherkson Quarry, which are the respondent's property, but this action concerns only Elco Beach.

The floor of Lake Erie fronting on Elco Beach is of fine sand with an undulating bottom, common to such beaches.

For several years the plaintiff and her husband have been in the habit of coming to Elco Beach and swimming there. They were there on the Monday preceding the day in question, and on Saturday the 10th August 1946, which is the day in question, they arrived at the beach at about 11 o'clock in the morning with their friends, Mr. and Mrs. Metzger and children.

The plaintiff and her husband and the others named were aware there were no life-guards, life-saving equipment or boats available.

Mr. Rogers and his friend Robert Metzger and Mr. Rogers's stepson changed into their bathing-suits, and went into the water. There is some conflict as to the height of the waves when they entered, but it is agreed that several of the party spent much of their time jumping and diving into the waves. After being in the water twenty to thirty minutes, it was observed that the water was becoming rougher. This, it appears, was due to a change in the wind. Mr. Rogers and Mr. Metzger decided to come out and at that moment Mr. Rogers discovered that his stepson, James Rogers, was in distress. He went to his aid, although he was a very indifferent swimmer, it being said that he could swim only some 50 feet, and it is quite evident that this could only be under favourable conditions. The stepson could swim somewhat better. It is said that they were caught in an undertow. At this time a car arrived on the beach with two men who were competent swimmers, and who had a rubber life-raft in their car, and who went to the aid of those in distress, and they rescued James Rogers, the stepson, but Mr. Rogers sank before they reached him. His body was recovered within a few minutes,

and artificial respiration commenced at once, but without success.

The appellant's claim is based first upon the ground that the waters were unsafe for bathing, and secondly, that the respondent ought to have provided life-guards and life-saving equipment.

The finding of the learned trial judge as to the first ground is as follows:

"First possibly I should say with regard to the case at bar that in my opinion the evidence does not establish that the water in front of the defendant's premises was dangerous or contained any unusual danger. In my opinion the condition of the water and the floor under the water and conditions affecting the water, such as undertow, were not in any way abnormal as compared to similar places where bathing takes place. The floor of the water is composed of sand, and evidence is given as to there being undulations and sandbars, which are natural features of such a place and not in any way unusual. I do not think the evidence shows any holes or deep portions which might be unexpected or take by surprise one using the water for bathing. I think this is shown by the witnesses who have spoken of their experience, and also by the measurements which have been taken."

As to the second ground, the learned judge found: (a) That there was no obligation upon the defendant to provide life-guards and life-saving apparatus. (b) That the deceased knew there were no life-guards and life-saving apparatus, and that the deceased accepted this situation when he went into the water. (c) That even if a life-guard had been there he was not satisfied that such a life-guard would have been able to rescue the deceased. It appeared that Mitchell and Grass, the latter an expert in rescue work, were on the scene at the time of the tragedy and proceeded with all available speed.

The respondent's submission is that the appellant has failed to establish that by charging 20c. per adult for the use of the road the respondent impliedly undertook to provide life-guards and life-saving apparatus, and I agree with him that terms ought not to be implied unless it is clearly necessary in order to give effect to the intention of the parties: see *Reid v. Town of Mimico*,

59 O.L.R. 579 at 586, [1927] 1 D.L.R. 235, a judgment of Masten J.A.; also *B. & M. Readers' Service Limited v. Anglo Canadian Publishers Limited*, [1949] O.R. 444 at 451, where the trial judge has collected the authorities.

I entirely agree with the findings of the learned trial judge to which I have referred, and would therefore dismiss the appeal with costs.

AYLESWORTH J.A., agrees with ROBERTSON C.J.O.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Brooks, Cromarty & Baker, Welland.*

*Solicitors for the defendant, respondent: Haines & Haines, Toronto.*

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[COURT OF APPEAL.]

**Hanley v. Hanley.**

*Divorce and Matrimonial Causes—Alimony and Maintenance—Distinction between Terms—Application before Judgment Absolute to Vary Amount of “Alimony”—The Matrimonial Causes Act, R.S.O. 1937, c. 208, ss. 1, 2.*

There is a clear distinction, which should be carefully observed in pleading, between interim alimony, permanent alimony, and maintenance. The only mention of “alimony” in The Matrimonial Causes Act is in s. 2(2), which deals with interim alimony.

Alimony *pendente lite*, or interim alimony, is an allowance granted to the wife while proceedings are pending and continues, unless otherwise ordered, until final judgment, but never beyond. If dissolution of marriage is refused the Court may nevertheless award permanent alimony in proper cases, and permanent alimony will run from the date of the judgment. If, on the other hand, the plaintiff obtains a decree nisi for dissolution the Court will deal with the prayer for maintenance and maintenance may be awarded to be effective from the date of the final judgment.

It is therefore proper, in an action for dissolution of marriage, to claim, in the appropriate circumstances: (a) interim alimony, *i.e.*, specified periodic sums payable, unless otherwise ordered, to the date of the final decree; (b) maintenance which, if awarded, may run from the date of the final decree; and (c), in the alternative to (b), permanent alimony, so as to provide for the case where dissolution of the marriage is refused.

AN APPEAL by the plaintiff from an order of Wells J., dismissing a motion for an increase of “alimony”. The trial judgment in the action is reported in [1948] O.R. 827, [1948] 4 D.L.R. 741, and was affirmed, [1949] O.R. 163, [1949] 2 D.L.R. 72.

21st September 1949. The appeal was heard by LAIDLAW, ROACH and AYLESWORTH JJ.A.

*H. L. Cartwright*, for the plaintiff, appellant: The chief ground of appeal is that Wells J. disposed of the matter without an examination of the husband—we sought to examine the defendant husband and two others. Counsel for the defendant took three preliminary objections: (a) that maintenance ordered by the judgment nisi did not become payable until the judgment was made absolute; (b) that the matters raised by the motion were before this Court in February, and were dealt with then; and (c) that the material filed in support of the motion did not conform to the Rules. Effect was given to these objections, and there has accordingly been no hearing upon the merits. As to the objections, the first is answered by s. 2(1)(b) of The Matrimonial Causes Act, R.S.O. 1937, c. 208. Alimony is merely a particular form of maintenance, being payable to a wife only: *Re Freedman*,

55 O.L.R. 206, [1924] 3 D.L.R. 517, 5 C.B.R. 47; *Gaisberg v. Storr*, [1949] 2 All E.R. 411. If a fine distinction is to be made, it might be more precise to refer to "alimony" up to the time of the decree absolute, and "maintenance" thereafter. As to the second objection, the matter has not been dealt with by this Court, since the facts were never before the Court. As to the third objection it may be that the affidavits are not strictly in compliance with the Rules, but the fact remains that we were not given an opportunity to examine the defendant husband, his father, or his employer.

*K. G. Morden, K.C.*, for the defendant, respondent: This motion was originally in two parts, dealing with maintenance for the wife and for the children. As to the children, the application stands adjourned.

There is a vital distinction between alimony and maintenance. Here the wife is receiving a weekly allowance, and the use of an apartment, and the judgment has not been made absolute, and we cannot apply to have that done: *Cartwright, The Law of Divorce*, 2nd ed. 1945, p. 117; *Fox v. Fox*, [1925] P. 157 at 160, 167, 172, 175. Section 2(1) of The Matrimonial Causes Act refers to maintenance after judgment absolute, while s. 2(2) refers to alimony before that judgment, or interim alimony. Alimony is payable to a wife, and maintenance to an ex-wife: *S. (otherwise B.) v. S.* [1944] 1 All E.R. 439; *Cependa v. Cependa*, [1945] O.W.N. 102, [1945] 2 D.L.R. 339, affirmed [1945] O.W.N. 731, [1945] 4 D.L.R. 806; *Gaisberg v. Storr, supra*. Interim alimony is designed to permit a wife to live modestly and quietly during the litigation.

We concede that under s. 2(1) an application may be made at any time to vary, but to take that course before the judgment has been made absolute is an abuse of the process of the Court unless there are unusual circumstances.

*H. L. Cartwright*, in reply: Maintenance includes alimony: *Re Carey*, [1940] O.R. 171, [1940] 1 D.L.R. 362. We are not claiming interim alimony.

[After the argument the following additional submissions were made in writing:

*For the appellant*: Interim alimony is normally payable only until the trial. The cases cited in support of the contention that the payments remain in the nature of interim alimony between judgment nisi and judgment absolute merely say that an order

for such payments will continue until judgment absolute unless varied. Payments made after judgment nisi but before judgment absolute may be described either as permanent alimony or as permanent maintenance: *Puddy v. Puddy*, [1948] O.W.N. 354, [1949] 1 D.L.R. 284. By the English practice, the allowance before the decree absolute is described as alimony and after the decree absolute it is called maintenance. The English practice, however, has not been introduced in Ontario: *H. v. H.*, [1933] O.W.N. 490, [1933] 3 D.L.R. 792. Section 2(1)(b) of The Matrimonial Causes Act permits this application to be made "at any time". The application for maintenance for the children is pending and it would be desirable to dispose of both applications at the same time.

*For the respondent:* The plaintiff was not seeking to vary permanent maintenance, but merely to increase the sums currently payable, *viz.*, interim alimony. The respondent throughout has taken the position that the maintenance ordered was permanent maintenance, and this position has been disputed throughout by the plaintiff's counsel. If para. 3 of the judgment nisi covers both interim alimony and permanent maintenance, there is no jurisdiction in the Court, except on appeal or on a motion under Rule 523, to vary a provision for interim alimony. In England such power has been given to the Court by statute, but there is no such statutory provision here, and an order for interim alimony must be regarded as interlocutory, and not appealable without leave: *Hendrickson v. Kallio*, [1932] O.R. 675 at 678, [1932] 4 D.L.R. 580; *Cumpson v. Cumpson*, [1934] O.R. 60, [1934] 1 D.L.R. 461.]

*Cur. adv. vult.*

21st October 1949. The judgment of the Court was delivered by

AYLESWORTH J.A.: This is an appeal from the order of Wells J., dated 20th April 1949, dismissing, to quote the terms of the notice of appeal, "the plaintiff's application for an increase in the alimony ordered on the judgment herein dated the 16th day of October, 1948".

In so dealing with the motion, Wells J. did not go into the so-called merits but gave effect to the respondent's preliminary objection that the motion was ill-founded and that the Court was without jurisdiction to hear it. A brief review of the proceed-



ings in the action is not only desirable for a proper appreciation of the point in issue, but reveals, I think, the key to its solution.

The writ for dissolution of the marriage and for other relief was issued on 28th August 1947. The statement of claim prays for dissolution of the marriage and custody of the two surviving children, and then follow two paragraphs therein which I quote in full:

“(c) Alimony pursuant to the provisions of the divorce and matrimonial clause being Chapter 208 of the Revised Statutes of Ontario, 1937.

“(d) Alternatively, alimony and maintenance because of the adultery of the defendants Joseph LeFevre Hanley and Margaret Blennherhasset.”

I am unable to reconcile the two paragraphs above quoted with any logical basis of claim or claims contemplated by the relevant law as to alimony and maintenance, including the Rules of Practice. It is unnecessary to trace the jurisdiction of the Court governing the award of alimony *pendente lite* or permanent alimony. The only mention of alimony in The Matrimonial Causes Act, R.S.O. 1937, c. 208, is in subs. 2 of s. 2 reading: “The Court shall have the same power to make an order for the payment of interim alimony as in the case of an action for alimony.”

Is it interim alimony which was sought in either para. (c) or para. (d) of the prayer in the statement of claim? And was maintenance as permitted by The Matrimonial Causes Act really sought in the alternative only as set out in para. (d) of the prayer? Or have the words “alimony” and “maintenance”, as used in the prayer, been employed as though they were completely synonymous? Loose and inaccurate pleading in such matters would seem to be quite prevalent and doubtless gives rise to some of the confusion which is apparent upon examination of proceedings such as those in the present action.

Alimony *pendente lite* or interim alimony is an allowance granted to the wife while proceedings are pending and continues until final judgment, unless otherwise ordered, but never beyond such judgment. If dissolution of marriage is refused, the Court may nevertheless award permanent alimony in proper cases. Permanent alimony will run from the date of the judgment. If, on the other hand, the plaintiff obtains a decree nisi, the Court

will deal with the prayer for maintenance and maintenance may be awarded effective from the date of the decree absolute.

In an action for dissolution of marriage it is therefore proper in the appropriate circumstances to claim:

(a) interim alimony, that is, alimony by way of specified periodic sums which will be payable to the date of final decree unless otherwise ordered;

(b) maintenance which, if awarded, may run from the date of the final decree; and

(c) in the alternative to (b), permanent alimony so as to provide for the case where dissolution of the marriage is refused.

Upon an examination of the proceedings here, I am confident that what it was really intended to claim was maintenance or, in the alternative, permanent alimony in the event the plaintiff failed in her prayer for dissolution of the marriage. It is to be noted that interim alimony in terms was not specifically claimed and that no sum per week or month was named for such interim alimony. In fact, the defendant, prior to the institution of the action and ever since, has been paying the plaintiff \$25 per week and providing her with living accommodation. The plaintiff would seem to have been content to accept the arrangement thus made in lieu of a claim for or award of interim alimony.

The judgment in the action by para. 3 thereof awarded the plaintiff "by way of maintenance" the sum of \$25 weekly and by para. 4 thereof secured to the plaintiff in the terms therein set out the additional sum of \$1,200 per annum to be paid in equal monthly instalments. Upon the defendant appealing from the judgment in so far as it secured the sum of \$1,200 to the plaintiff, the plaintiff gave notice that upon the hearing of the appeal she would ask "that the order of the learned trial Judge should be varied by increasing the amount of maintenance to be granted to the plaintiff." Roach J.A. delivered the judgment of the Court of Appeal, [1949] O.R. 163, [1949] 2 D.L.R. 72, and refers in terms to paras. 3 and 4 of the judgment in appeal as awarding and securing "maintenance" and further points out that ss. 1 and 2(1) of The Matrimonial Causes Act deal with maintenance. It is only when we come to the notice of the motion brought on before Wells J. that we find an attempt to treat para. 3 of the judgment pronounced at the trial as a paragraph dealing with

"alimony", the relevant part of the notice of motion reading: "for an order increasing the amount of alimony allowed by the Honourable Mr. Justice Wells in the judgment herein dated the 16th day of October, 1948".

Upon this basis, preliminary objection was made to the motion on the part of the defendant, as I have already said, and Wells J. proceeded to give effect to that preliminary objection.

In my view the disposition made of the motion by Wells J. was correct. The plaintiff in bringing her motion was requesting something for which there was no basis upon her action as framed. Such of the material as had been completed and filed on behalf of the plaintiff at the time the preliminary objection was heard indicates that it is immediate relief which the plaintiff seeks and not a variation in the amount of maintenance which becomes effective upon decree absolute.

Counsel for the appellant urged at the hearing of the appeal that if the Court were of the view that para. 3 of the judgment did not award "alimony", the plaintiff nevertheless should be permitted under s. 2(1)(b) of The Matrimonial Causes Act to proceed with the motion brought before Wells J. with the object of securing an increase in the amount of maintenance directed to be paid by the said paragraph. The subsection referred to reads as follows:

"if the means of the husband shall at any time after the making of such order be increased, the Court may, if it is deemed proper, increase the amount payable under any such order".

I am not prepared to accede to this submission. To do so would be to substitute for the motion actually brought a new and different motion altogether and one which would be governed by materially different considerations than those relevant to the motion as brought. It may very well be that in view of the rather broad language of s. 2(1)(b) of The Matrimonial Causes Act an application may now be brought to increase the amount of maintenance awarded by para. 3 of the judgment, although the award will only become effective upon decree absolute which has not yet been obtained. If so, it is for counsel to decide whether in all the relevant circumstances, and bearing in mind the comparatively recent date as of which the question of such an increase was argued before the Court, such a motion may now be brought with reasonable chance of success, a matter upon



which I find it unnecessary and undesirable to express any opinion.

I would dismiss the appeal with costs if demanded.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Cartwright & Cartwright, Kingston.*

*Solicitor for the defendant husband, respondent: William James Henderson, Kingston.*

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[McRUER C.J.H.C.]

### Macnaughton v. Stone.

*Barristers and Solicitors—Duties and Obligations—Solicitor, as Purchaser of Land, Agreeing to Act as Vendor's Solicitor—Repudiation by Vendor—Duty of Solicitor to Advise, etc.*

*Sale of Land—Special Terms—Purchaser Agreeing to Act as Solicitor for Vendor—Position of Parties—Demand for Return of Deposit.*

A solicitor who has personal dealings with his client cannot, by advising his client to retain another solicitor, relieve himself of obligations already incurred. If a dispute arises the onus is on the solicitor to prove affirmatively that he disclosed without reservation all the information in his possession affecting his client's rights, that he advised the client as diligently against himself as he would have done if the transaction had been one between the client and a stranger, and that the transaction as it developed was as advantageous to the client as it would have been if he had been negotiating with a stranger. *Demerara Bauxite Company, Limited v. Hubbard et al.*, [1923] A.C. 673; *Gibson v. Jeyes* (1801), 6 Ves. 266 at 276, applied.

Accordingly, where it is a term of an agreement for the sale of land that the purchaser shall act as solicitor for the vendors, without charge, and the vendors notify the purchaser, before the date fixed for completion, that they do not propose to carry out the contract, the purchaser, if he demands the return of the deposit cannot, if the deposit is not returned, merely advise the vendors that he can no longer act for them and that they should consult another solicitor. If he is prepared to treat the contract as at an end if the deposit is returned to him he must advise the vendors to that effect, and in any event it is his duty to advise them that it is in their interest to return the deposit, leaving only the matter of the agent's commission to be settled.

*Contracts—Anticipatory Breach—Sale of Land—Declaration by One Party that he Will not Perform—Rights of Other Party—Alternative Nature of Rights.*

Where the vendor under an agreement for the sale of land announces, before the date fixed for completion of the sale, that he will not carry it out, the contract is not rescinded, since this can be done only by both parties in agreement. The purchaser has three courses open to him: (a) he may elect to treat the contract as at an end and demand the return of his deposit; or (b) he may treat the contract as broken as of the date of the vendor's announcement, and sue for damages arising from the breach; or (c) he may treat the contract as valid and subsisting and bring an action for specific performance if it is not performed; in this last case the vendor, at any time before the date for completion, may elect to carry out the contract, and the

purchaser will then be bound by its terms. *Frost v. Knight* (1872), L.R. 7 Ex. 111; *Johnstone v. Milling* (1886), 16 Q.B.D. 460, applied. These courses however, are alternative, and if the purchaser demands the return of his deposit he cannot thereafter, if the deposit is not returned, treat the contract as valid and subsisting and sue for specific performance.

AN ACTION for specific performance or damages.

22nd to 24th June 1949. The action was tried by MCRUER C.J.H.C. without a jury at Toronto.

*Gordon N. Shaver, K.C.*, and *G. M. Paulin*, for the plaintiff.

*R. J. Stanbury*, for the defendant.

15th November 1949. MCRUER C.J.H.C.:—The plaintiff's claim is for specific performance of an alleged contract for the purchase and sale of no. 23 Park Road, in the city of Toronto, or, in the alternative, for damages.

It is alleged that the defendant and her husband, the late Professor Stone, contracted to sell the property in question to the plaintiff for the sum of \$10,500 payable \$300 as a deposit on the date of the signing of the agreement, \$3,200, subject to adjustments, on the date of closing and the balance to be secured by a first mortgage payable \$50 monthly together with interest at 5 per cent. per annum, the balance of the principal sum to be payable in five years with the right of renewal for a further period of five years. The agreement, which is in writing, is dated the 27th August 1948. The day fixed for the completion of the contract was the 1st October 1948.

The property was owned by the defendant and the late Professor Stone (to whom I shall hereafter refer as the vendors) as joint tenants. They had listed it for sale with one Blamire, a real estate agent, at the price of \$11,500. In the month of August 1948 the plaintiff placed an advertisement in the newspapers indicating that he was in the market to buy a house. Blamire communicated with him and introduced him to the vendors. At first the vendors asked \$12,000 for the property. The plaintiff refused to pay this amount but expressed a willingness to pay the sum of \$10,500, which the vendors refused to accept. Negotiations were reopened a few days later at the instance of Blamire when some further bargaining took place. During the discussions and before the agreement was signed, the plaintiff stated to the vendors that he would act as their solicitor, with-

out charge, in carrying out the transaction. To this the vendors agreed, subject to the plaintiff paying all the registration fees.

Following this the written contract was signed. It makes no reference to the fact that the plaintiff was to act for the vendors free of charge and pay the registration fees, but it contains the following term, which is part of the printed form used: "It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property supported hereby other than as expressed herein in writing." Notwithstanding this term the written contract does not in fact express the whole agreement between the parties. The plaintiff gave his evidence in a very frank and straightforward manner and from his evidence and that of the defendant there can be no doubt that the plaintiff agreed to act for the vendors without charge and pay the costs of registration in completing the transaction and this was undoubtedly taken into account when the agreement was signed. The following endorsement appears on the back of the agreement: "Vendors' solicitor: Alex MacNaughton, El. 8307, 19 Melinda St."

Following the signing of the contract, Professor Stone attended on the plaintiff and delivered the title-deeds of the property to him, for the purpose of having the necessary conveyances drawn. Early in September the defendant telephoned the plaintiff and told him that she and her husband had decided that they would not carry out the contract. The defendant says that she did this because of medical advice that Professor Stone was not in such good health as would permit him to travel to British Columbia where they had planned to go to live. The plaintiff says that when the defendant told him she would not complete the transaction he asked her to return the deposit and she said he would have to get it from Mr. Blamire, the agent. The plaintiff says that he telephoned Mr. Blamire and asked him to return the deposit but Mr. Blamire stated that he did not know of any legal or moral reason why he should and refused to do so. The plaintiff said in evidence that if the deposit had been returned he would have treated the matter as closed.

Notwithstanding this, on 8th September the plaintiff wrote a letter to the vendors insisting that the contract should be carried out and stating: "It will be impossible for us to act for



you any further in this connection and we must therefore advise you to consult another solicitor." The letter concludes:

"Should you unfortunately persist in refusing to complete the sale of the above property, the undersigned will attend at your home on Friday, October 1, 1948 and formally tender you, as required by law, the balance owing to you for the purchase of your property, together with Mortgage duly executed pursuant to the terms of the agreement. If you do not accept this money and the Mortgage as tendered and in exchange give the undersigned a properly executed deed to your property and vacant possession of the ground floor and basement, he will *immediately* bring an action against you in the courts of the Province for an Order directing you to grant the property to him or, in the alternative, directing the Registry Office to enter the undersigned as the owner. All Court costs will, of course, by court order be deducted from the balance owing to you.

"Needless to say, we shall be most pleased to hear from you to the effect that you have reconsidered your decision."

Following the receipt of this letter the vendors consulted a solicitor, Mr. R. T. Hunter, who had some negotiations with the plaintiff but these were "without prejudice" and cannot affect the outcome of the case. The defendant persisted in her refusal to complete the contract and on 21st September Professor Stone suffered a stroke and was admitted to the hospital. From the stroke he died on 8th October. On the death of Professor Stone the legal estate in the property passed to the defendant.

On 1st October the plaintiff attended at the defendant's home with legal tender to the amount of the purchase price but did not have with him proper conveyances. He found no one at home and no further effort was made to make formal tender. It is not argued that sufficient tender was made, but it is argued that, notwithstanding what was said in the plaintiff's letter of 8th September, tender was excused as it would have been useless.

The rights of the parties in this action cannot be disassociated from the fact that before the contract was entered into the plaintiff had agreed, as part of the consideration for the contract, to act as solicitor for the vendors, without charge. This was a proposal advanced by the plaintiff, the acceptance of which put on him all the responsibilities of a solicitor to a client until the relationship was by mutual agreement terminated, or the con-

tract was completed. I think the plaintiff misconceived his position when he considered that he could relieve himself of his obligations to the vendors *nunc pro tunc* by simply advising them on 8th September to retain another solicitor. It is quite true that it would have been improper for him to do otherwise when he decided to follow the course outlined in his letter of 8th September, but that cannot relieve him of the responsibilities that were on him before that date and give him a legal right to enforce a contract that would not otherwise be enforceable, by reason of what had taken place before that letter was written. As soon as the plaintiff agreed to act as solicitor for the vendors he was in the position of a solicitor having personal dealings with his clients and should a dispute thereafter arise the onus was on him to prove affirmatively that he disclosed without reservation all the information in his possession affecting his clients' rights and that he advised the vendors against himself as diligently as he should have done had the transaction been one between his clients and a stranger.

When the defendant told the plaintiff that the vendors did not propose to carry out the transaction and he asked for a return of the deposit, a new situation developed and the precise relationship of the parties has an important bearing on the outcome of this case. Undoubtedly the plaintiff was then in the position of a solicitor dealing with a client with whom he was negotiating to bring a contract between them to an end. If the plaintiff now seeks to rely on the position he took on 8th September he must prove, as I have stated, that he advised the vendors as diligently as he should have done had the transaction been one between his clients and a stranger and that the transaction as it developed was as advantageous to his clients as it would have been if he had been negotiating with a stranger: see *Demerara Bauxite Company, Limited v. Hubbard et al.*, [1923] A.C. 673 at 681, and *Gibson v. Jeyes* (1801), 6 Ves. 266, 31 E.R. 1044, per Lord Eldon at p. 276. The plaintiff should have fully advised the vendors as to the legal position created by his request for the return of the deposit upon the repudiation of the contract. This I discuss later in another aspect. Obviously, if he had been advising on a contract between the vendors and a stranger in similar circumstances he would have advised them that it was in their interest to comply with the request and return the deposit,

leaving only the question of the agent's commission to be considered, and that they should do nothing to compromise that position. In my view he was also bound to disclose to them that if they returned the deposit he would consider the matter closed, as he stated in his evidence. If he had in his mind an alternative that if the vendors did not return the deposit he would bring an action for specific performance, again they ought to have been precisely advised as to their rights so that they might exercise independent judgment in considering whether they would return the deposit or not.

It is not suggested that any advice whatever was given by the plaintiff to the vendors at this critical period of the development of their legal relationship, nor was any advice tendered to them as to what was in their best interests. In those circumstances it is difficult for me to see how the plaintiff can now proceed against the defendant to enforce the contract by reason of the vendors' failure adequately to protect their interests in dealing with him, when it was his duty to advise them how to protect their interests. If the plaintiff should be permitted to succeed in this action he would in effect be in the position of a solicitor getting a judgment against his clients for specific performance which might have been avoided if the clients had been properly advised by him to return the deposit when that course would have closed the matter. Such an adjudication would in my view be contrary not only to the principles moving a Court of equity but also to those followed in Courts of law.

A further difficulty, however, stands in the way of the plaintiff's success.

When the defendant told him that they would not carry out the contract there was an anticipatory breach of the contract. The effect of a declaration made by one party to a contract in advance of the date fixed for performance that he will not carry it out is not to rescind it; it takes two parties to bring a contract to an end. But when one party assumes to renounce a contract of this sort before the date fixed for its performance, the other party has three courses open to him:

(1) he may elect to treat the contract then and there as at an end and demand the return of his deposit; or



(2) he may treat the contract as broken as of the date on which the other party has renounced it and sue for damages sustained by the breach; or

(3) he may treat the contract as valid and subsisting and bring an action for specific performance if it is not performed according to the terms thereof.

In the last case the party who renounces the contract may, at any time before the time fixed for completion, elect to carry it out and the other party will then be bound by its terms.

*Frost v. Knight* (1872), L.R. 7 Ex. 111, and *Johnstone v. Milling* (1886), 16 Q.B.D. 460, are the two leading cases in which these principles are propounded. In the latter case Lord Esher M.R. at p. 467 said: "The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

The course followed by the plaintiff when the defendant told him that she and her husband would not carry out the contract cannot be rationalized with any other view than that he regarded that as a termination of the contractual relationship. The request for the return of the deposit is not consistent with an intention to treat the contract as valid and subsisting and to bring an action for specific performance if the contract was not performed according to the terms thereof. The plaintiff, having elected to treat the contract as at an end by demanding the return of the deposit, could not by himself revive it when the deposit was not returned. It is just as true that it takes two to revive a contract as it is that it takes two to rescind one.

The plaintiff's position may be tested in another way. If nothing more had happened after the agent had refused to return the deposit and the vendors had brought action after the

1st October to enforce the contract, could it be said that the plaintiff would not have had a perfect defence by saying "You repudiated the contract and I asked for a return of the deposit which was refused"? How could it be said that he was keeping the contract alive for their benefit? If in those circumstances there would be no contractual relationship on 1st October, the letter of 8th September could not create one.

Having come to the conclusion that the plaintiff cannot succeed for the reasons stated, it is unnecessary for me to discuss what bearing the plaintiff's statement in his letter of 8th September that he would make formal tender and the failure to do so might have on his right to succeed.

I wish to make it quite clear that nothing I have said is to be taken as any reflection on the personal integrity of the plaintiff. I think he misconceived his legal position and duties and that only. But where solicitors mix their professional services with their private transactions they must expect to have the law which throws around their clients great protection strictly applied. This is in the public interest and the Court ought to be particularly vigilant when the clients are of the great age and in the otherwise helpless condition to protect themselves that the vendors were in this case.

The action fails with respect to the claims for specific performance and damages. I think, however, that the plaintiff is entitled under the general prayer to judgment for \$300, being the amount of the deposit paid on account of the contract. There will be no order as to costs.

*Judgment accordingly.*

*Solicitors for the plaintiff: Shaver, Paulin & Branscombe, Toronto.*

*Solicitors for the defendant: Aylesworth, Garden, Stuart & Thompson, Toronto.*

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[McRUER C.J.H.C.]

**Lukow v. Trebek.**

*Judgments and Orders—Varying—Judgment Pronounced by Judge in Accordance with Minutes of Settlement—Formal Judgment Not in Accordance with Minutes—Inherent Power of Court—Rule 523.*

Where the judge before whom an action comes on for trial directs that judgment be entered in accordance with minutes of settlement filed, and endorses the record accordingly, and a formal judgment is later taken out which does not conform in all respects to the minutes of settlement, a judge in Weekly Court has power to vary the formal judgment, so as to make it conform to the minutes, both by virtue of the inherent jurisdiction of the Court to control its own orders and under Rule 523. *Hatton v. Harris*, [1892] A.C. 547; *Prevost v. Bedard* (1915), 51 S.C.R. 629; *Kidd v. National Railway Association* (1916), 37 O.L.R. 381, applied; other authorities reviewed.

A MOTION under Rule 523 to vary the formal judgment in the action.

28th September 1949. The motion was heard by McRUER C.J.H.C. in Weekly Court at Toronto.

*H. M. MacMaster*, for the defendant, applicant.

*N. Romanick*, for the plaintiff, *contra*.

16th November 1949. McRUER C.J.H.C.:—This is a motion made under the provisions of Rule 523 to vary the formal judgment herein to make it conform to the minutes of settlement entered into when the action came on for trial before Mr. Justice LeBel on the 11th December 1946. The action arose out of a partnership dispute. The plaintiff claimed a declaration that no partnership existed between him and the defendant and a direction that the defendant account to him for moneys received on his account, together with an order that the defendant return to the plaintiff all books of account, etc., in his possession. An alternative claim was made for an order for dissolution of the partnership, if one should be found to have existed, and a direction that the partnership accounts be taken. The defendant contended that a partnership existed and asked no other relief than that the action be dismissed with costs.

The minutes of settlement were drawn in longhand by the plaintiff's counsel and signed by the parties. Their respective signatures were witnessed by their counsel. The minutes read as follows:

“(1) Both parties to account for all business in question done by each of them up to and including February 22nd, 1946,



and profits, if any, to be equally divided between the parties, without admitting the partnership between the parties.

“(2) The defendant Trebek in addition to account for any business done by him in the business in question after and following February 22, 1946, and to pay over to plaintiff profits of same, if any.

“(3) The defendant and the plaintiff to forthwith deliver all the books, papers and documents in their respective possession with reference to business done up to February 22, 1946, and the defendant, in addition to so deliver all the books, papers and documents in his possession with reference to business done by him after February 22, 1946, to Special Examiner Stonehouse.

“(4) Each party to pay his own costs.

“(5) Unless the parties otherwise agree by the 15th day of January, 1947, reference to the Master accordingly.

“(6) The plaintiff shall be deemed to be the sole owner of the business in question as from and following Feb. 22-46.”

My brother LeBel made the following endorsement on the record: “Judgment to go in accordance with minutes of settlement filed”, and the minutes of settlement were attached to the record.

The formal judgment was drafted by counsel for the plaintiff and submitted to counsel for the defendant who marked it “approved” and initialled it. The recital and paras. 1 and 2 are important for the consideration of this motion. They read as follows:

“THIS ACTION coming on for trial this day at the sittings holden at Toronto for trial of actions without a jury, in the presence of counsel for all parties, upon hearing read the pleadings and what was alleged by counsel aforesaid, and the parties hereto through their counsel consenting to this judgment, as appears by the Minutes of Settlement, filed;

“1. THIS COURT DOTH ORDER AND ADJUDGE that both parties to this action account for monies received by them, respectively, for or on behalf of the business of electrical appliance dealers carried on in the City of Toronto, in the County of York, under the name of G. Luke's Electrical Appliance Company for the period up to and including the 22nd day of February, 1946, and that after crediting the parties hereto with the amounts put in

by them respectively into the said business, the profits, if any, be equally divided between the parties hereto.

"2. AND THE COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendant Mike Trebek, in addition, account for all the monies received by him for and on account of the said G. Luke's Electrical Appliance Company from and after the 22nd day of February, 1946, up to the date of this trial, and that after deducting any monies contributed by him during that period to the said business, the said Defendant Mike Trebek do pay over to the Plaintiff Sidolf Lukow the difference."

After prolonged negotiations the parties proceeded with a reference to take the accounts before the Master of the Supreme Court. On the proceedings before the Master it appeared that prior to 22nd February 1946 the plaintiff had sold certain commercial refrigerators and refrigerator counters to customers and received a deposit on account of the orders, but these articles were not delivered until after the 22nd February 1946, when the balance of the purchase price was paid. It was contended on behalf of the plaintiff that on the true construction of para. 1 of the formal judgment the balance of the purchase price of these articles was money received by him after the 22nd February 1946, and did not come within the terms of the formal order requiring him to account. On behalf of the defendant it was argued that according to the minutes of settlement the plaintiff was to account for all business done by him up to and including the 22nd February 1946, and that the balances paid on account of sales made prior to 22nd February should be accounted for as payments made on account of business done prior to that date. The true contention of the plaintiff does not appear to have been fully developed before the learned Master, who did not discuss the precise terms of the formal order but held that the defendant was entitled to participate in any profit resulting from the sale of merchandise prior to the 22nd February 1946. From this finding the plaintiff appealed and the appeal came on before my brother Gale, who comprehended the importance of the distinction between the wording of para. 1 of the formal judgment and that of para. 1 of the minutes of settlement, and while not making a finding on the matter adjourned the hearing of the appeal for the purpose of giving counsel for the defendant an opportunity to launch this motion to vary the terms of the formal judgment.

The solicitor for the plaintiff in an affidavit filed states that before the draft of the formal judgment was prepared some consideration was given by him to the wording of the judgment and particularly to the fact that the word "business" used in paras. 1 and 2 of the minutes of settlement did not give proper and full effect to the intention of the settlement since there was no proper record of business transactions up to the 22nd February 1946, and the defendant was out of the business following that date. He contends that a provision that both parties account for business up to the 22nd February 1946, and that the defendant in addition account for business following that date did not appear to him to have expressed the intention of the parties or to have any practical meaning having regard to para. 6 of the minutes of settlement by which the plaintiff was to be deemed the sole owner of the business following the 22nd February 1946. A draft of the formal judgment was sent by letter to counsel for the defendant, but nothing in this letter indicates that there was any intention in drafting the formal judgment to depart from the express meaning of the minutes of settlement. The affidavit goes on to say that an appointment for the settlement of the formal judgment was taken out before the Registrar of the Supreme Court and that in the presence of the solicitor for the defendant minutes of the formal judgment were settled by the Registrar and subsequently the formal judgment was signed by the Registrar and entered, but again there is no suggestion that there was any intention to vary the minutes of settlement and it is clear from the affidavit of the solicitor for the defendant that in marking the formal judgment "approved" he did not intend to vary the settlement as expressed in the minutes.

In considering the legal rights of the parties in these circumstances it is necessary to have clearly in mind the precise nature of the procedure followed. The judgment in the case is the judgment of my brother LeBel. He performed the judicial act which must determine the rights of the parties. The procedure that followed is an administrative act which ought to carry out but not vary the effect of the judicial act. The exercise of the judicial function was based on the minutes of settlement signed by the parties and not on a revision of the minutes of settlement prepared by one of the solicitors. If it was proposed to revise



the trial judge's judgment the plaintiff's solicitor ought to have gone to him for his approval.

My jurisdiction to vary the formal judgment in these circumstances may be considered in two aspects: (a) the inherent jurisdiction of the Court to control its own orders; (b) the powers vested in me under Rule 523. In approaching this consideration and discussing the cases I am not overlooking that this is a consent judgment from which, under s. 23 of The Judicature Act, R.S.O. 1937, c. 100, there is no appeal.

The leading case with reference to the jurisdiction of the Court to control its own orders is *In re Swire; Mellor v. Swire* (1885), 30 Ch. D. 239. In that case the formal order as drawn did not express the true meaning of the judgment of the Court. The party complaining attended by his solicitors before the Registrar and objected to the form of the order, but did not state that he was going to apply to the Court to vary the minutes (the proper procedure). The order was issued and a motion was subsequently launched to vary the order. A careful perusal of the judgment and the arguments advanced by the respective counsel makes it clear that, quite irrespective of the provisions of Rule 523, the Court has power in proper cases to make its records conform to the judgment of the Court. At p. 243 Cotton L.J., after pointing out that the proper course according to the procedure would have been to have moved to vary the minutes before the formal order was issued, said:

"But although that is the regular course, and it is only in special circumstances that the Court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the Court has jurisdiction over its own records, and *if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon*, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, *that it may be in accordance with the order really pronounced.*" (The italics are mine.)

Lord Justice Lindley at p. 246 said: "This case has raised a discussion of some importance, because it was contended that when once the order of the Court was passed and entered it could not be put right, even although as drawn it did not express the order as intended to be made. I protest against

any such notion. There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal."

Bowen L.J. at p. 247 said: "I think the true view is, as stated by the Lord Justice Cotton, that every Court has inherent power over its own records as long as those records are within its power, and that it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, *provided the amendment be made without injustice or on terms which precluded injustice.*" (The italics are mine.)

This case was discussed and approved, but not applied, by Romer J. in *Ainsworth v. Wilding*, [1896] 1 Ch. 673. There it was sought, on motion, to set aside a consent judgment after the order was issued, not on the ground that the order did not conform to the minutes of settlement, but on the ground that the settlement did not express the intention of the parties. Romer J. held that the parties must be left to have their rights determined in an action brought for that purpose. The action was brought and the whole matter was again discussed in *Wilding v. Sanderson*, [1897] 2 Ch. 534. Careful attention to the facts of that case goes far to answer many of the arguments put forward on behalf of the plaintiff. The action arose out of a dispute over a mortgage account. Upon its coming on before Romer J. a settlement was made between the parties. Minutes were then settled by counsel and a judgment was taken by consent. The terms of the judgment were:

"This Court doth by consent declare that the indenture of mortgage of October 7, 1877, ought to stand as a security for the amount which, upon taking the accounts hereinafter directed, shall be found to be due to the defendant John Wilding.

"And it is by consent ordered that the following accounts and inquiry be taken and made."

The order went on to provide that the accounts were to be taken "on the footing and by way of continuation of the account delivered in the action of *Smith v. Wilding* up to the 7th of October, 1877". The plaintiff proceeded on the order and brought in an account in the form of an ordinary account by a mortgagee in possession who had sold part of the mortgaged property. Stirling J. held that the account was in proper form. On appeal the Court of Appeal took a different view and decided that the true construction of the judgment taken by consent was that the account ought to be taken as a current account with interest at 5 per cent. on either side. This involved a considerable loss to the plaintiff. Then followed the motion before Romer J. to which I have referred. Upon his refusal to vary the order of the Court the action was brought and Byrne J. gave judgment setting aside the order of the Court. The matter was appealed to the Court of Appeal. The judgment of Lindley L.J. at p. 549 makes it clear that no claim was made for rectification of the formal judgment. The only claim was that the judgment should be set aside, which involved setting aside the consent order, and the judgment proceeded on that basis. At p. 548 the learned Lord Justice observes:

"The judgment, however, as drawn up, is so worded as to go far beyond what was agreed and decided when judgment was given. . . .

"The order as it stands was drafted by counsel for the plaintiffs, and was assented to by counsel for John Wilding. The words, therefore, were agreed to. But it is not suggested that the agreement to which the parties had come at an earlier stage of the proceedings was ever departed from or modified in any way. The words were assented to by Wilding's counsel in the belief that they carried out the agreement previously arrived at, and nothing else. No departure from this agreement ever having been suggested, he was justified in treating his opponent as submitting a form of words proposed with the same view. In my opinion the case stands thus—either there was a mutual mistake, or the one party has fallen into a mistake into which he has been led by the other. Whichever view is right, the order, as drawn up and passed and entered, does not express the real agreement between the parties."

The learned Lord Justice goes on to point out that it was only when the Court of Appeal took a different view from that



held by Stirling J. that the mistake which had been made in drawing up the order became apparent and that "it cannot be truly said to have been discovered by Wilding at any earlier date".

At p. 551 Chitty L.J. said: "I have arrived at the conclusion that there was an actual agreement come to in court between the parties, but that the order was incorrectly drawn, and did not embody the true agreement. The language of the order was, no doubt, accepted by all parties, but without any intention of departing from the meaning of the agreement come to in court. Consequently, there was common error, and a case is made for putting the order right or setting it aside. *But the respondents do not ask for rectification, and are content with the order being set aside simply. No one asks for rectification.*" (The italics are mine.)

*In re Swire; Mellor v. Swire*, *supra*, was later approved by the House of Lords in *Hatton v. Harris*, [1892] A.C. 547 at 560, and by the Judicial Committee of the Privy Council in *Milson v. Carter*, [1893] A.C. 638. Reference is made to both these cases by Duff J. (as he then was) in *Prevost v. Bedard* (1915), 51 S.C.R. 629, 24 D.L.R. 862. Although Mr. Justice Duff's judgment is a dissenting one, the dissent is not with reference to the statement of the law as I am asked here to apply it. At p. 633 he says:

"The whole matter is summed up in the following sentence taken from the judgment of Lord Watson in *Hatton v. Harris*:

"'When an error of that kind has been committed, it is always within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the *order which the judge obviously meant to pronounce.*'" (The italics are those of Duff J.)

While in *Hatton v. Harris* and *Milson v. Carter* an error of a more technical sort than the one I have here to consider was being discussed, I think the italics in the quotation made by Duff J. from the judgment of Lord Watson very clearly emphasize the principle which should be applied and govern my decision.

In *Kidd v. National Railway Association* (1916), 37 O.L.R. 381 at 387, 31 D.L.R. 354, Masten J. in precise language distinguishes between altering the substance and the form of the

judgment: "To alter the substance of the judgment as pronounced by the Court, whether on account of mistake in consent or otherwise, is one thing. To alter the form of the judgment so as to make it conform to the decision of the Court is another. The first is to relieve one party from a consent given under a misapprehension. The second is to effectuate the intention of the Court."

In the case before me, as I have stated, my brother LeBel gave the judgment of the Court in the terms of the minutes of settlement. If the minutes of settlement do not express the intention of the parties they can only be rectified or set aside by an action brought for that purpose, but until that is done the records of the Court should be made to conform to the judgment that was delivered.

It is argued that a formal judgment based on a judgment given pursuant to consent minutes of settlement is on a different footing from a judgment otherwise pronounced. This argument, however, is not supported by authority.

In *Kinch v. Walcott et al.*, [1929] A.C. 482 at 493, Lord Blanesburgh, after referring with approval to *Wilding v. Sanderson*, said: "In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal."

Lord Justice Kay in *Huddersfield Banking Company, Limited v. Henry Lister & Son, Limited*, [1895] 2 Ch. 273 at 284, said: "Now, what is this consent order? After all, it is only the order of the Court carrying out an agreement between the parties."

It was stressed in argument that counsel for the defendant had approved the draft of the formal judgment, but his approval of the draft judgment cannot in any sense be taken to be consent to a variation of the minutes of settlement. The words of Lord Justice Lindley in *Wilding v. Sanderson*, *supra* at p. 548, which I have already quoted, may be precisely adapted to this case. The order as it stands was drafted by counsel for the plaintiff and was assented to by counsel for the defendant. The words, therefore, were agreed to. But it is not suggested that the agreement to which the parties had come at an earlier stage of the proceedings was ever departed from or modified in any

way. The words were assented to by the defendant's counsel in the belief that they carried out the agreement previously arrived at and nothing else. No departure from this agreement ever having been suggested, he was justified in treating his opponent as submitting a form of words proposed with the same view. In fact, I gravely doubt the authority of the defendant's counsel to alter the terms of settlement by giving approval to a formal judgment that did not conform to the agreement signed by the parties: see *Neale v. Gordon Lennox*, [1902] A.C. 465.

It was further argued that the defendant has deprived himself of any right to the relief claimed by reason of the delay in bringing this motion. The judgment of Lord Justice Lindley in *Wilding v. Sanderson*, *supra*, at p. 551, completely answers any contention that the defendant by his delay has deprived himself of his right to have the formal judgment varied, where he says: "The answer to this contention is that he did not know that there was any mistake to rectify until his construction of the order was held to be erroneous, and that as soon as he found out his mistake he set to work to have it put right."

In the case before me the defendant did not know until the argument before my brother Gale that it was contended that the formal judgment departed from the basis of settlement as expressed in the minutes of settlement, and it has not been shown that anything has intervened to prejudice the plaintiff.

On these authorities I therefore hold that, quite apart from Rule 523 which has no counterpart in the English law, I have power to rectify the formal judgment to make it conform to the judgment actually delivered at the trial pursuant to the minutes of settlement.

I think, however, as the motion purports to be made under the provisions of Rule 523, I should deal with its application. The Rule reads as follows:

"A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further or other relief than that originally awarded may move in the action for the relief claimed."



It will be observed that this Rule is very awkwardly worded and badly punctuated. This fact creates some difficulty in interpretation. The Rule had its origin in the old Chancery Order 330, which read:

“Any party entitled by the former practice to file a bill of review, praying the variation or reversal of an order, upon the ground of matter arising subsequent to the order, or subsequently discovered, or a bill in the nature of a bill of review, or a bill to impeach a decree on the ground of fraud, or a bill to suspend the operation of a decree, or a bill to carry a decree into operation, is to proceed by petition in the cause, praying the relief which is sought, and stating the grounds upon which it is claimed.”

In 1888 this Rule was adopted, with some variation in the phraseology, as one of the Rules of Practice and Procedure of the Supreme Court of Judicature, as Rule 782, and appears as Rule 642 in the revision of 1897. In 1913 (Rule 523) the words “shall proceed by petition in the cause praying the relief which is sought, and stating the grounds upon which it is claimed” were struck out and the following was substituted: “or to any further or other relief than that originally awarded may move in the action for the relief claimed”.

I was at first somewhat puzzled as to whether the precise relief here claimed comes within the four corners of this Rule. My doubts, however, have been allayed by a careful consideration of the judgment of Masten J. in *Kidd v. National Railway Association*, *supra*, and I think the defendant is entitled to relief under the Rule as well as under the inherent jurisdiction of the Court.

An order will go rectifying the formal judgment to make it conform to the minutes of settlement filed, upon the defendant paying the costs of this motion.

*Order accordingly.*

*Solicitors for the defendant, applicant: Bogart & MacMaster, Toronto.*

*Solicitors for the plaintiff, respondent: Romanick & Romanick, Toronto.*

[URQUHART J.]

**Re Quinn.**

*Insurance—Life—Beneficiaries—Death of Sole Designated Preferred Beneficiary—Express Provision in Policy—History of Legislation—The Insurance Act, R.S.O. 1937, c. 256, s. 160(1), (4).*

In each of two policies of insurance, issued in 1923, it was provided that the insurer would pay the proceeds, on the death of the insured, "to the beneficiary of the Insured, or if there be no beneficiary entitled, to the executors, administrators or assigns of the Insured". The wife of the insured was named in each policy as the beneficiary, and she predeceased him. The insured made no declaration under s. 153, and made no reference to the insurance in his will, under which his residuary estate went to two of his children.

*Held*, the provision in the policy was not such an express provision as was contemplated by s. 160(1) of The Insurance Act, since it did not expressly refer to the prior death of the designated beneficiary, and a beneficiary might cease to be "entitled" otherwise than through death. The provision in the policy was consequently insufficient to exclude the operation of s. 160(4), and the proceeds of the policies were accordingly payable in equal shares to all children of the insured living at the time of his death. *Re Liddell* (1923), 53 O.L.R. 477; *Re Goatbe* (1923), 53 O.L.R. 118; *Re McLaren*, [1937] O.W.N. 663, considered.

A MOTION by the executors of the will of Martin Joseph Quinn, deceased, for the opinion, advice and direction of the Court.

3rd November 1949. The motion was heard by URQUHART J. in Weekly Court at Toronto.

*C. H. Walker*, for the executors.

*J. L. McLennan, K.C.*, for the executors in their personal capacity (residuary beneficiaries under the will).

*J. D. Pickup*, for three other children of the testator.

*Fern A. Levis*, for the Public Trustee, representing a sixth child, an incompetent.

*F. T. Watson, K.C.*, for the Official Guardian.

14th November 1949. URQUHART J.:—Originating motion for the interpretation of the will of the deceased and in regard to the disposition of two of his insurance policies.

Upon the argument I determined orally as to question (1) that all the provisions of the will must be carried out and that the clauses referred to as being in question in the notice of motion, were not repugnant to a general clause occurring fairly early in the will, and such question will be answered accordingly.

Question 2 it was agreed need not be answered. Question 3 had to do with two policies of insurance in the London Life Insurance Company for \$5,000 each, in which a named wife,

who predeceased the testator by three years, was named as beneficiary. By The Insurance Act, R.S.O. 1937, c. 256, she was of the preferred class.

All possible claimants on the policies are children of the deceased. If the policies fall into the estate and form part of the residue, the proceeds will go to the two adult children who are residuary beneficiaries. If the policies pass under s. 160 of The Insurance Act, then all children of the testator will participate in the proceeds.

Section 160 reads as follows:

“(1) Subject to subsection 2 the contract may provide or the insured may at any time direct by declaration that if a preferred beneficiary shall die before the maturity of the contract, the insurance money or any part thereof appointed to the preferred beneficiary shall be payable to the insured, to his estate, or to any other person, whether that person is within the class of preferred beneficiaries or not.

“(2) Where the contract provides or the insured by a declaration directs that insurance money shall go to a preferred beneficiary and in the event of the death of the preferred beneficiary to some other person in the class of preferred beneficiaries, and the first named beneficiary dies, the insured may before the maturity of the contract exercise only the powers referred to in section 157.

“(3) In case of the death of a preferred beneficiary before the maturity of the contract and in the absence of any provision in the contract or a declaration by which some other person in the class of preferred beneficiaries is to become entitled to the insurance money or any part thereof appointed to the deceased beneficiary in the event of his death or upon the happening of any other event, the insured may deal under section 153 with the insurance money or part thereof in the same manner and to the same extent as if the deceased beneficiary had not been a preferred beneficiary.

“(4) Subject to the provisions of this section the share of a preferred beneficiary who dies before the maturity of the contract shall be payable as follows:

“(a) If the deceased beneficiary was a child of the person whose life is insured, and has left issue surviving at the maturity of the contract, his share, and any share to which he would have



been entitled if he had survived, shall be payable to such issue in equal shares, such issue taking by representation.

“(b) If there is no person entitled under clause *a*, the share of such deceased beneficiary shall be payable to the surviving designated preferred beneficiary or beneficiaries in equal shares.

“(c) If there is no person entitled under clauses *a* and *b*, the share of such deceased beneficiary shall be payable in equal shares to the wife or husband and the child or children of the person whose life is insured living at the maturity of the contract, and the issue then living of any deceased child of the person whose life is insured, such issue taking in equal shares the share to which his or their parent would have been entitled if living.

“(d) If there is no person entitled under clauses *a*, *b*, and *c*, the share of such deceased beneficiary shall be payable to the insured, or his estate.”

The policies were taken out on 25th October 1923, and 29th November 1923 respectively. Each of the policies, after setting out the nature of the policy, the insured and the preferred beneficiary, bears on the first page thereof the following provision:

“IN CONSIDERATION and upon condition of the payment of the premiums above specified, THE LONDON LIFE INSURANCE COMPANY promises to pay the Face Amount, at its Head Office, upon proof of the death of the Insured and compliance with Clause 12 on the second page hereof, to the beneficiary of the Insured, or if there be no beneficiary entitled, to the executors, administrators, or assigns of the Insured, unless this policy be previously surrendered by the Insured as provided in the Dividend Conversion Privilege contained in Clause 17 on the third page thereof.”

Curiously enough, all who appeared before me (and everyone interested is represented) argue that the policies fall within subs. 4(c) of s. 160 of The Insurance Act notwithstanding the provision in the policy above set forth. Upon the argument, I was the only one who was of the contrary opinion.

The point is said to be a new one and no authority has been cited to me, nor have I been able to find any exactly in point.

Section 160(1) enacts that the policy may provide, or it permits the insured at any time to declare, that if the named beneficiary should die before the maturity of the contract, the moneys due shall be payable to his estate, among other things. This

subsection is subject to the next subsection, but the situation contemplated by that subsection did not come into effect here.

The deceased made no declaration in his lifetime at any time after the issue of the policy, under s. 153, so that it is argued that the division falls under subs. 4(c). That would be so if the above provision in the contract does not bring the policy within the provisions of s. 160(1) that "the contract may provide". In this case the contract has made a certain provision quoted above. The words are not "in the event of death of the preferred beneficiary named hereunder"; they are "if there be no beneficiary entitled".

A wife would not be entitled if she were divorced before the death of the insured. Section 161(1) reads: "Where the wife or husband of the person whose life is insured is designated as beneficiary, and is subsequently divorced, all interest of the beneficiary under the policy shall pass to the insured or his estate, unless such beneficiary is a beneficiary for value, or an assignee for value."

This subsection was in the 1927 revision and therefore was enacted before The Divorce Act (Ontario), 1930 (Dom.), c. 14, was passed and first appeared in 14 Geo. V., c. 50, s. 143 (after these policies were issued).

There are other ways in which a wife might cease to be entitled: see s. 162, first enacted by 14 Geo. V., c. 50, s. 144.

Section 160 first appeared in its present form in 1935 (25 Geo. V., c. 29, s. 17(1) and (2)). In the revision of 1927 these sections appear in somewhat different form, proceeding from the provisions of 14 Geo. V., c. 50, s. 142, assented to in April 1924 (a consolidation of the Insurance Acts existing at that time). These provisions were therefore not in the Act when the contracts in question herein were made.

The law applicable to preferred beneficiaries which was in force at the time of the contract is found in The Insurance Act, R.S.O. 1914, c. 183, ss. 178 to 182, as amended by 4 Geo. V., c. 30, s. 11, and 6 Geo. V., c. 36, s. 5.

At the time the policies were issued, the powers of the deceased would, as was pointed out by Rose J. in *Re Liddell*, 53 O.L.R. 477, [1924] 1 D.L.R. 673, decided in February 1923, fall to be governed by s. 178(7) of the 1914 statute which provided that if the sole preferred designated beneficiary died in his (the

assured's) lifetime he might by declaration provide that the share of the person so dying should be for the benefit of the assured or his estate, or for any other person whether or not such person belonged to the preferred class.

Also in that category there was another case, namely *Re Goatbe*, 53 O.L.R. 118, [1923] 4 D.L.R. 1165.

In the *Liddell* case, one policy was payable to a named wife "or in the event of her prior death, to the executors, administrators or assigns of the assured"; and the other policy, "in case she should predecease assured" to the same persons. In the *Goatbe* case, the policy provided for payment to the beneficiary "if alive", and if not, then to the insured's executors, administrators and assigns.

The effect of the decisions in both cases is that these declarations made in the contract itself were ineffective to defeat the general law, and that the Act, as it stood then, contemplated that it was necessary that the deceased should make some declaration (*i.e.*, exercise some judgment) after the wife had died, to bring into play the old s. 178(7), above referred to.

In 1924 a change was made by s. 142, allowing the provision in the policy to be made, but the law appeared in its present form, a more comprehensive form, in 1935.

In 1937 the case of *Re McLaren*, [1937] O.W.N. 663, 5 I.L.R. 1, was decided under The Insurance Act then in force, R.S.O. 1927, c. 222, as amended by 25 Geo. V., c. 29. In that case the proceeds of a certain policy were payable to a sole beneficiary, the named wife, "if living". The named wife died about two years before the testator, who remarried. The will of the testator made no reference to the policy, nor did the policy itself make any alternative designation. The clause then fell under the terms of our present subs 4(c), and the widow and children took in equal shares. The situation in that case differs from the situation in the present case in that in the present there is the above provision in the policy itself.

When the Act was changed in 1924, and, more particularly, when it was put in its present form in 1935, there must have been hundreds of policies, like the present, in force where there was a sole preferred designated beneficiary, in most cases the wife, and in which there was some alternative provision in case of the death of the beneficiary, set right out in the contract. Section



160 would therefore have a retroactive aspect. This is also confirmed by 25 Geo. V., c. 29, s. 3, which repealed R.S.O. 1927, c. 222, s. 120(2).

This provision has been carried forward to the present Act by s. 129(2) in slightly different wording, *viz.*: "This Part shall apply to every contract of life insurance made in the Province before the 1st day of January, 1925, where the maturity of the contract had not occurred before that date."

Therefore I take it that if the deceased had made an effective provision in a contract before that date the Court will give effect to it.

Assuming therefore that s. 160 applies and that a provision in the contract dealing alternatively with the proceeds would be otherwise effective, the question now arises whether the deceased has by the contract effectively brought s. 160(1) into play.

It is strongly argued before me that the subsection gives a precise way to the deceased to take away from the preferred beneficiaries as a class and that the statute should be closely if not slavishly followed, and that when he says "if there be no beneficiary entitled" that is not the equivalent of saying "if the named beneficiary dies before the maturity of the contract", even if on account of death there is no beneficiary entitled.

As I pointed out, the wife could cease to be entitled in more than one way, and if she had, for example, been divorced, the provision in the contract would, in my opinion, have been ineffective to prevent s. 160(4) (c) from coming into play.

To my mind, the word "entitled" implies that a living person is then in existence. The word "entitled" as used here is used in one of its meanings, *viz.*, "to regard or treat a person as having title to anything" and the word entitled means one "who has a title or qualification". Such meanings imply that the person in question is then living.

Indeed, s. 160 itself indicates such a meaning and therefore provides its own dictionary. Subs. 1 makes the direct provision and gives the right "if a preferred beneficiary shall die" that the insured can do something with the policy. Nothing more is contemplated. Subs. 3 says in the absence of "a declaration by which some other person in the class of preferred beneficiaries is to become entitled". That deals with something conferred upon a

living person. Subs. 4 again deals with the share of a preferred beneficiary "who dies before the maturity of the contract", but in paras. (b), (c) and (d) it is provided that "If there is no person entitled" certain things will happen.

It is clear that the legislators have used the word "entitled" to refer to somebody living at maturity. So while in a sense a person who is dead is not "entitled", yet I think that the contract should have followed fairly closely the powers given by s. 160(1). I do not say the precise words of the section should be followed, *e.g.*, the words in the *Goatbe* case, *supra*, "if alive and if not, then to the executors", would suffice to bring the section into play.

Therefore, contrary to what I thought at the hearing, and with some reluctance, I am forced to the conclusion set forth above, and my answer to question 3 is that all children of the deceased living at his death will share in the policies.

This may not look to be the intention of the deceased as expressed in the policy, but as the policy was made in 1923 and the clause in question is on the printed form, it is difficult to say whether the deceased had any real intention on the point or not. Certainly at the time he made the policy the declaration in the policy was of no effect.

Judgment accordingly. Costs of all parties, those of the executors as between solicitor and client, should be borne, one-half by the estate and one-half by the insurance fund.

The insurance company was on my direction not represented. In none of the cases set forth above, nor in others read by me, has the company been represented, and it appeared to me only to add costs to the proceedings unnecessarily by having it served. I have no doubt that if there is no appeal the company will pay out on above basis.

*Judgment accordingly.*

*Solicitors for the executors: Macdonald and Macintosh, Toronto.*

[SCHROEDER J.]

**The City of Ottawa v. The Ottawa Valley Trust Company et al.**

*Taxation—Municipal Real Property Assessment—Crown Lands—Interest of Tenant—Whether Occupant a Tenant—Expropriation Proceedings—Tenancy at Will—The Assessment Act, R.S.O. 1937, c. 272, ss. 1(o), 38 (as amended by 1946, c. 3, s. 6), 74, 100—The Municipal Act, R.S.O. 1937, c. 266, s. 315.*

Land belonging to E was expropriated by the Dominion Government in 1943, but E remained in occupation and full enjoyment until May 1946, when arrangements were made for a lease to E on a monthly basis. This followed an award of compensation (which did not include interest) by the Exchequer Court. E died in November 1946, being still in occupation of the land, and his trustees remained in occupation until the following year. The land was assessed in each year by the municipality, and E did not appeal from the assessments. The taxes being unpaid, the municipality sued the executors and trustees of the estate for unpaid taxes for 1944 to 1947 inclusive.

*Held*, the plaintiff was entitled to judgment. As to the 1943 taxes, they were based on an assessment made in 1942, when E was still the owner of the land, and there could therefore be no question as to the validity of this assessment. From the time of the expropriation until the negotiation of the lease in 1946, E remained in possession, although there was no express arrangement, without objection by the Crown, and, although he paid no rent during that time, he clearly had an interest in the land and should be deemed to be a tenant within the definition in s. 1(o) of The Assessment Act. His interest in the lands was accordingly taxable. *Stinson v. The Township of Middleton*; *Wright v. The Same*, [1949] O.R. 237, referred to. There could be no question as to the tenancy after the negotiation of the lease, since rent was paid after that time. The fact that E was not alive when a demand for payment of 1947 taxes was made was immaterial, since he was alive when the assessment roll was returned in 1946. *Re Williams and Regimbal*, [1935] O.R. 199; *Re Lyman Brothers Ltd.*, [1933] O.R. 159, referred to. The municipality having thus established a *prima facie* case under the provisions of ss. 74 and 100 of The Assessment Act, and there being no defence to meet that *prima facie* case, judgment should go for the amount claimed, with interest and costs.

AN ACTION to recover unpaid taxes.

15th and 16th November 1949. The action was tried by SCHROEDER J. without a jury at Ottawa.

G. C. Medcalf, K.C., for the plaintiff.

J. D. Watt, K.C., for the defendants.

16th November 1949. SCHROEDER J. (orally):—The plaintiff, a municipal corporation, brings this action against the executors and trustees of the late Gordon C. Edwards to recover the sum of \$16,058.05 and interest thereon, said to be owing for real estate taxes duly levied by the municipal corporation against property known for municipal purposes as Nos. 4, 10, 24 and 26 Sussex Street in the city of Ottawa. The property in question



is residential and consists of a very large dwelling and several outbuildings erected on land which runs down to the south bank of the Ottawa River. This property was for many years owned and occupied by the late Gordon C. Edwards and continued to be occupied by him until his death on the 2nd November 1946.

In the month of June 1943 His Majesty in the right of the Dominion of Canada instituted expropriation proceedings pursuant to the provisions of The Expropriation Act, R.S.C. 1927, c. 64. On the 12th June 1943 a plan and description of the land in question in this action were deposited of record in the office of the Registrar of Deeds for the City of Ottawa, pursuant to the provisions of s. 9 of the Act. On that date His Majesty in the right of the Dominion of Canada became the owner of the property in accordance with the provision of s. 9 that "such land, by such deposit, shall thereupon become and remain vested in His Majesty".

To determine what occurred subsequently to this date reference must be made to the evidence of Mr. Claude Steven Boucher, who was employed in the Department of Public Works as a lease agent, and who occupied that position during all relevant periods of time. Mr. Boucher stated that after the expropriation became effective on 12th June 1943, "Mr. Edwards remained in possession of the property; the Crown did not enter into possession in any way". He proceeds to say: "We entered into occupation on May 13, 1946 and as of that date we arranged a lease with the late Mr. Edwards." This followed the date of the judgment of the President of the Exchequer Court, whereby he fixed the amount payable by the Government at \$140,000 without interest. He continues: "Until the month of May 1946 the Crown spent no money on the property and did not insure it, and after the expropriation and until May 1946, the Crown collected no rents from anyone in respect of this property." In the month of May 1946, however, correspondence ensued between Mr. Edwards and the Department of Public Works, and this correspondence, which has been filed in the action, culminated in the passing of an order in council dated the 17th September 1946, filed in this action as ex. 3. The order in council provides, *inter alia*, as follows:

"The Committee, therefore, on the recommendation of the Minister of Public Works, advise that authority be granted to lease No. 10 and 24 Sussex Street, Ottawa, to Mr. Gordon C.

Edwards, on a month to month basis from May 13, 1946, at a monthly rental of \$808, and on the other terms and conditions stated above."

One of the conditions, to which I draw attention, is the following:

"The Crown, as lessor, to be responsible for major repairs to roof, outer walls and foundations only, and pay property taxes.

"The lessee to be responsible for minor repairs including redecoration as and when required, heating, lighting and cleaning, including maintenance of grounds around the buildings."

A lease embodying the terms of the order in council was prepared but was never executed, and Mr. Edwards died on the 2nd November 1946.

From the 13th May 1946 to the 12th October 1946 the Crown collected rent from the late Mr. Edwards at the rate of \$808 per month, in all the sum of \$4,040, and for the period extending from 13th October 1946 to 30th September 1947 the Crown collected, as a result of a compromise entered into with the trustees of the late Mr. Edwards, \$1,649, so that a total sum of \$5,689 was received by the Crown for rent of this property either from the late Mr. Edwards or from his trustees for the period commencing on 13th May 1946 and extending to the 12th April 1947.

The late Mr. Edwards was permitted to remain in undisturbed possession of this property until 13th May 1946 without any arrangement having been made with the Crown, as I have already stated. This fact was the subject of comment in the reasons for judgment of the learned President of the Exchequer Court, Mr. Justice Thorson, which are reported *sub nom. The King v. Edwards*, [1946] Ex. C.R. 311 at 337, and from which I quote: "The defendant has been in undisturbed possession of the expropriated property since the date of its expropriation and has collected the rents from the two small buildings on Sussex Street. He is, therefore, not entitled to any allowance of interest."

But for this fact, no doubt, the usual allowance of interest at the rate of 5 per cent. per annum, in accordance with the provisions of s. 32 of The Expropriation Act, would have been made. This would have involved a payment of \$7,000 per year for interest between the date of the expropriation and the date of the judgment. In place of this, however, Mr. Edwards enjoyed complete control and possession of the expropriated premises.

That he did exercise control over the property is not left in doubt so far as the evidence is concerned, because it appears that not only did he and his servants occupy the main residential structure, but he also received rents from the tenants of two smaller buildings which formed part of the property, and when one of the tenants, McLaughlin, surrendered possession of a portion of the property which had been demised to him, Mr. Edwards himself had the new tenant, Schwartz, placed in possession of the same property. He also undertook to make extensive alterations to what is known as the garage building, on the upper half of which he constructed an apartment which he subsequently rented for \$100 per month; so that in these various ways he exercised control over the property in a manner which would leave little doubt in one's mind that whatever the nature of his occupancy might be, he was an occupant with an interest in the property.

The municipal corporation made assessments of these lands in the years 1943, 1944, 1945 and 1946 as the basis for taxation in the years 1944, 1945, 1946 and 1947. In the year 1943 the late Mr. Edwards was assessed as owner of the premises but in the years 1944, 1945 and 1946 he was assessed as a tenant of premises owned by the Crown. All necessary steps were taken as prescribed by the terms and provisions of The Assessment Act, R.S.O. 1937, c. 272, and in accordance with the relevant municipal by-laws, which were enacted pursuant to statute. The by-laws of the City of Ottawa which fixed the time for making the assessments in the various wards of the City of Ottawa have been filed as ex. 5 (a), (b), (c) and (d), and this property, which was situated in Rideau Ward, was assessed pursuant to the provisions thereof which fixed the time for making assessments in Rideau Ward as follows: in the year 1943 as 8th May; in the year 1944 as 5th August; in the year 1945 as 8th September; and in the year 1946 as 15th August. The assessment rolls were duly revised and officially returned and taxation was based thereon pursuant to the provisions of The Assessment Act and the by-laws of the corporation which were applicable. Demands for payment were duly made for each of the years 1944, 1945, 1946 and 1947. It is not suggested that there was not the strictest compliance on the part of the municipality with all the requirements of the relevant statutes or by-laws relating to the making



of assessments, or the levying of taxes, but what is challenged in these proceedings is the right of the municipality to make an assessment against Mr. Edwards, having regard to the fact that during the period of time under consideration the property was owned by the Crown and that he was not a tenant thereof or of any portion thereof.

In this aspect of the case the period with which we are concerned should, for convenience of consideration, be divided into two separate periods, the first extending from the 12th June 1943 to the 12th May 1946, and the second extending from the 13th May 1946 to the 12th April 1947. During the first period the City's authority to make the assessment and levy the taxes, which it made and which it levied, was derived from s. 38 of The Assessment Act. This section, as it existed during that period, read as follows:

"The tenant of any land owned by the Crown (except a tenant occupying the same in an official capacity under the Crown) and the owner of any land in which the Crown has an interest and the tenant of any such land shall be assessed in respect of the land in the same way as if the land was owned or the interest of the Crown was held by any other person; in addition to the liability of every such person to pay the taxes assessed against such land, the interest, if any, of every person other than the Crown in such land shall be subject to the charge thereon given by section 99 and shall be liable to be sold under the provisions of this Act for arrears of taxes accrued against the land."

The question to be determined is whether or not Mr. Edwards was a tenant of land owned by the Crown from and after the 12th June 1943. It is to be noted that as to the year 1943 the assessment was made in 1942 and at that time, admittedly, the late Mr. Edwards was the owner of the property, so that no question arises as to taxation for the year 1943, but as to the years 1944, 1945 and 1946 the question already mentioned becomes material.

Obviously, the late Mr. Edwards was not in the position of a trespasser during this period, and it is clear that he was permitted to remain in possession of the property and to enjoy the user thereof without any express arrangement having been entered into between the parties, but certainly without any objection on the part of Crown authorities.

It is contended by counsel for the municipal corporation that the position which he occupied was that of a tenant at will. Tenancy at will is defined in Williams, Canadian Law of Landlord and Tenant, 2nd ed. 1934, at p. 115 as follows: "A tenancy at will is created where one man lets another into possession of lands by an agreement express or implied that they are to be held at the will of either." A tenancy at will most frequently arises by implication of law as, for example, where a person enters or remains in possession by consent of the owner of the land; it is clear upon authority that a mere permission to occupy land creates a tenancy at will only.

The conduct of all parties in this case is such that a tenancy at will ought to be inferred from all the circumstances disclosed in the evidence. Moreover the contention that the late Mr. Edwards was a tenant of the Crown during the period under consideration does find a basis in the definition of "tenant" which is to be found in s. 1(o) of The Assessment Act, namely, " 'Tenant' shall include occupant and the person in possession other than the owner." That is the statutory definition of "tenant" for the purposes of the Act. No doubt it is a very broad definition and one sufficiently broad to justify the Court in holding that Mr. Edwards, during his lifetime, was a tenant within the meaning of s. 38 of The Assessment Act, provided that his possession was not as servant or agent. His tenancy, whatever its nature, had to be one which involved an interest on his part in the lands. It is manifest from the wording of s. 38(1) of the Act that what was intended was an assessment on which a tax *in rem* would be levied, in contrast to a tax *in personam*.

Because the interest of the Crown in Crown lands is not liable to taxation, s. 38(1) must be construed as authorizing an assessment of Crown lands only where "the tenant" of such lands has an interest therein. On this point reference may be made to *Stinson v. The Township of Middleton*; *Wright v. The Same*, [1949] O.R. 237, [1949] 2 D.L.R. 328. The defendants submitted that the occupancy of the late Mr. Edwards was in his capacity as a caretaker or supervisor of the property, but no foundation for such contention is to be found in the evidence. In various ways, as already stated, he exercised exclusive control and dominion over the premises and I can only conclude that his occupation of the premises was of such a nature that he must be held to have had an interest in the same.

No question is raised as to Mr. Edwards having been a tenant of the Crown during the second period extending from the 13th May 1946 until the date of his death, or as to his trustees being tenants from 2nd November 1946 to April 1947, because, clearly, they were paying rent to the Crown during such period. However, it should be mentioned in passing that s. 38 of The Assessment Act was amended by 1946, c. 3, s. 6, so that the section as amended reads as follows:

“The tenant of land owned by the Crown where rent or any valuable consideration is paid in respect of such land and the owner of land in which the Crown has an interest and the tenant of such land where rent or any valuable consideration is paid in respect of such land shall be assessed in respect of the land in the same way as if the land was owned or the interest of the Crown was held by any other person.”

This statute became effective on the 5th April 1946 when it received Royal assent.

The last assessment with which we are concerned in this case was made on the 15th August 1946 when the assessment roll was returned, and at that time the lease between the Crown and the late Mr. Edwards had been entered into. As was held in *Re Williams and Regimbal*, [1935] O.R. 199, [1935] 2 D.L.R. 283, the date of the return of the assessment roll is the critical date. The contention that the late Mr. Edwards, having died on 2nd November 1946, was not alive when the demand for payment of taxes was made in the year 1947, and was therefore not taxable, is decisively answered by the provisions of s. 315 of The Municipal Act, R.S.O. 1937, c. 266, which reads as follows:

“The council of every municipality shall in each year levy on the whole rateable property according to the last revised assessment roll, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year, but shall not assess and levy in any year more than two and a half cents in the dollar on the assessed value of such property, according to the last revised assessment roll, exclusive of school and local improvement rates and exclusive of any rate not exceeding two mills in the dollar for granting aid to public hospitals for the purposes mentioned in paragraph 28 of section 404.”

This section was considered by the Court of Appeal in *Re Lyman Brothers Ltd.*, [1933] O.R. 159, [1933] 1 D.L.R. 738,



14 C.B.R. 248 at 256. There it was held that the City having in the year 1931 adopted for that year the assessment of 1930, it was as if, in the first instance, the assessment had been prepared and concluded for one, single, indivisible period of two years, namely, 1930 and 1931, and the company against which business tax had been levied was not entitled at any time during the said two-year period to have its business assessment removed from the last revised assessment roll and, it not having been removable, the company remained throughout that period liable to taxation incident to such assessment.

Although the assessments in this case were made against the lands in question, there is no doubt of the right of the municipality to recover the taxes levied upon such assessments as a personal debt due to the municipality in an action brought for such purpose. Reference may be made upon this point to s. 100 of The Assessment Act. It should be pointed out that although the municipality took all the proceedings prescribed by the provisions of The Assessment Act, the late Mr. Edwards did not at any time appeal from the assessments, and the assessment roll was in each year finally revised without any appeal having been taken by him. Section 74 of The Assessment Act provides:

"The roll, as finally passed by the court, and certified by the clerk as passed, shall, except in so far as the same may be further amended on appeal to the judge of the county court, be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in the notice required by section 52, or the omission to deliver or transmit such notice, provided that the provisions of this section in so far as they relate to the omission to deliver or transmit such notice shall not apply to any person who has given the clerk or assessment commissioner the notice provided for in subsection 7 of section 52."

It is also to be noted that s. 100, mentioned above, provides: "The taxes payable by any person may be recovered with interest and costs, as a debt due to the municipality; in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person, purporting to be signed as a true copy by the clerk of the municipality, shall be *prima facie* evidence of the debt."

No defence has been presented in the case at bar to meet the *prima facie* case thus raised. No doubt if there were no basis in fact, or no proper legal foundation, for the making of the original assessments, then, notwithstanding the broad and sweeping terms of ss. 74 and 100, the defendants would have no difficulty in overcoming the *prima facie* case raised pursuant thereto, so that if in this case the Court were to hold that Mr. Edwards was not, in fact, a tenant of the premises during the relevant period of time, then, no doubt, the proper legal foundation for the making of the assessment and the levying of the taxes would not exist. It having been held that Mr. Edwards was during the relevant period of time a tenant of the Crown, ss. 74 and 100 of The Assessment Act raise an insurmountable difficulty in the way of the defendants.

For the foregoing reasons I hold that the plaintiff is entitled to succeed in this action, and direct that judgment be entered in favour of the plaintiff for the sum of \$16,058.05 with interest thereon to the date of judgment, in accordance with the proper by-laws of the City of Ottawa. The plaintiff is also entitled to the costs of this action.

*Judgment for plaintiff.*

*Solicitor for the plaintiff: Gordon C. Medcalf, Ottawa.*

*Solicitors for the defendants: Gowling, MacTavish, Watt, Osborne & Henderson, Ottawa.*

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## [COURT OF APPEAL.]

**Rex v. Brezack.**

*Criminal Law—Arrest—Search of Person on Arrest—Rights of Police Officers.*

A police officer, in arresting without warrant one whom he suspects, on reasonable grounds, of being in illegal possession of narcotics, is entitled at the time of the arrest to search the person of the prisoner and in so doing even to put his finger inside the prisoner's mouth, if the information he has supports a reasonable belief that the drug may be concealed there. *Bessell v. Wilson* (1853), 20 L.T.O.S. 233; *Leigh v. Cole* (1853), 6 Cox C.C. 329; *Gordon v. Denison* (1895), 22 O.A.R. 315; *Dillon v. O'Brien and Davis* (1887), 20 L.R. Ir. 300 at 316, referred to.

AN APPEAL against conviction and sentence.

8th November 1949. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and AYLESWORTH JJ.A.

*E. A. Benevides*, for the appellant.

*C. P. Hope, K.C.*, for the Attorney-General, respondent.

30th November 1949. The judgment of the Court was delivered by

ROBERTSON C.J.O.: This is an appeal from the conviction and sentence of the appellant by Magistrate Hopkins at Hamilton, on the 5th August 1949, on the charge that the appellant, at the city of Hamilton, did unlawfully assault Police Constable James A. Macauley, a peace officer, making an arrest, contrary to the provisions of s. 296(b) of The Criminal Code, R.S.C. 1927, c. 36.

As the circumstances are somewhat unusual, it will be well to give them in some detail.

On the day of the assault with which the appellant is charged, Constable Macauley of the Royal Canadian Mounted Police, on special duty on the narcotic squad at Hamilton with another constable, having made some investigations, and having reason to believe that the appellant was committing, or was about to commit, a breach of The Opium and Narcotic Drug Act, 1929 (Dom.), c. 49, established themselves in a position where they could keep certain premises, known as the Golden Grill, under observation. While so stationed they saw the appellant come around a street corner and proceed in the direction of the Golden Grill. At the same time they observed certain persons known to them to be drug addicts also going in the direction of the Golden Grill. The



appellant had a prior conviction for having in his possession a narcotic drug, in breach of The Opium and Narcotic Drug Act, and from information received the constables believed that at this time appellant had in his possession narcotics in breach of the statute. Their information led them to expect that they would find the capsules containing the narcotic concealed in appellant's mouth.

Acting on the information they had, the constables, as appellant approached the Golden Grill, left their place of concealment and, with two other constables, rushed upon him. One of them seized appellant by the arms, and Constable Macauley caught him by the throat, to prevent him swallowing anything he might have in his mouth. The three of them fell to the ground and a considerable struggle ensued there. Constable Macauley persistently tried to insert his finger in appellant's mouth, to recover the drug that he assumed was there, and each time he tried appellant bit his finger. A good deal of force was applied by the constables, and Constable Macauley at last succeeded in getting his fingers in appellant's mouth, and satisfied himself that there was no drug there. The appellant was allowed to stand upon his feet, and was taken away from the crowd that had gathered. The constables then searched his clothing, but did not find any narcotic on him anywhere.

The constables then took appellant over to the car which he had left parked around the corner when he was making his way to the Golden Grill. There were two other persons found in the car, and upon searching the car the police found, in various places on the floor, five capsules containing narcotics. Three capsules were found beside the floor-mat at the front seat, and two at the rear seat. Appellant was then taken into custody, and later this charge of assaulting the police was laid.

The acts of the appellant in biting the constable's finger, and in striking and kicking the constable in the struggle on the ground, while the constable was endeavouring to force his finger inside appellant's mouth, were alleged to constitute an unlawful assault upon a peace officer while engaged in the lawful execution of his duty as such peace officer making an arrest, contrary to the provisions of s. 296(b) of The Criminal Code. Appellant denied that he had either bitten or struck or kicked the constable, and said that he was the one assaulted. The magistrate has, however, decided that issue against him, on conflicting evidence,

and we cannot reverse him on a plain question of fact. Appellant contends further that the constable had no right to try to insert his finger in appellant's mouth, and that the constable's attempt to do so constituted an assault.

In my opinion the evidence supports the finding of the magistrate that the constable was engaged in the lawful execution of his duty as a peace officer making an arrest, and, believing the information he had, was entitled even to search in appellant's mouth for evidence of the offence of which he believed appellant to be guilty. It is true that the appellant did not have any narcotic drug on his person at the time, but he had such drug in his motor car around the corner, and *prima facie* that is possession contrary to the provisions of The Opium and Narcotic Drug Act, s. 17, as re-enacted by 2 Geo. VI, c. 9, s. 5. The constable was warranted in arresting the appellant, on the information he had, although his information was wrong as to where the drug would be found. It was his duty, in making the arrest, to make reasonable efforts to obtain possession of any narcotic that he believed to be illegally in the appellant's possession, both for the purpose of using it as evidence of possession against the appellant, and also to prevent him disposing of the drug in a manner that would involve perpetrating another crime.

Much was sought to be made in argument by the appellant's counsel of the fact that, without any search warrant, the constable had gone the length of forcibly inserting his finger inside the appellant's mouth. The constable, on the other hand, appeared to think that he had very wide powers of search. Quite improperly, counsel conducting the prosecution asked the constable the following questions:

"Q. Outline briefly what your rights are under the Narcotics Act so far as search is concerned? A. Under this authority under the Opium and Narcotic Drug Act a person can be searched and considerable necessary force used.

"Q. The officers have the right to use necessary force to search a suspect who is suspected of breaking the Opium and Narcotic Drug Act? A. That is correct.

"Q. Use reasonable force to get evidence? A. That is correct."

The Opium and Narcotic Drug Act contains very little in the way of authority to search the person. Section 19(1) provides: "Any constable or other peace officer who has reasonable

cause to suspect that any drug is kept or concealed for any purpose contrary to this Act, in any store, shop, warehouse, outhouse, garden, yard, vessel, vehicle or other place, may search by day or night any such place for such drug, and if necessary, by force, may search any person there found, and, if such drug is there found, bring it before a magistrate having jurisdiction in the matter." The search of the person in this case preceded any other search, and independently of the search of any such place as the statute mentions. The appellant was searched because the constable had reasonable cause to suspect that he had the drug in his mouth as he walked along the street.

*Bessell v. Wilson* (1853), 20 L.T.O.S. 233, is the report of a case tried before Lord Campbell, in which he made, in somewhat general terms, some observations on the right of a constable to search an arrested person. In a footnote to the report of this case in the Law Times is the report of certain remarks made by Lord Campbell at the close of the argument of the case, to correct an erroneous impression that, as he had been informed, had gone abroad. I quote from the footnote:

"It was supposed that I had said that there was no right in any one to search a prisoner at any time. I have not said so. It is often the duty of an officer to search a prisoner. If, for instance, a man is taken in the commission of a felony, he may be searched to see whether the stolen articles are in his possession, or whether he has any instruments of violence about him; and, in like manner, if he be taken on a charge of arson, he may be searched to see whether he has any fire-boxes or matches about his person. . . . It may be highly satisfactory, and indeed necessary, that the prisoner should be searched. I have never said that searching a prisoner was always a forbidden act. What I said applied to circumstances such as existed in this case."

Reference may also be made to *Leigh v. Cole* (1853), 6 Cox C.C. 329, from which a quotation is made, with approval, in *Gordon v. Denison* (1895), 22 O.A.R. 315, and to *Dillon v. O'Brien and Davis* (1887), 20 L.R. Ir. 300 at 316. See also Tremear's Criminal Code, 5th ed., 1944, pp. 73-4, and Halsbury's Laws of England, 2nd ed., vol. 9 (1933), p. 472, note (f).

In my opinion, as I have already said, the evidence in this case supports the finding of the magistrate that the constable was engaged in the lawful execution of his duty as a peace officer in making the arrest, and that the attempt to search the



inside of appellant's mouth was a justifiable incident of that arrest. That the appellant was liable to arrest without a warrant is, I think, beyond question, and the evidence—and particularly the evidence afforded by the capsules containing a narcotic, found in appellant's motor car a few minutes later—strongly supports the reasonableness of the constable's belief in the information he had received, that the prohibited drug would be found concealed in appellant's mouth.

It is important to observe that the search that was made is justifiable as an incident of the arrest. The constable who makes an arrest has important duties, such as to see that the prisoner does not escape by reason of being armed, and to see if any evidence of the offence for which he was arrested is to be found upon him. A constable may not always find his suspicions to be justified by the result of a search. It is sufficient if the circumstances are such as to justify the search as a reasonable precaution. In my opinion there was an arrest here when the constables seized the person of the appellant. The evidence would indicate that they did not inform him immediately that he was arrested, and of the cause of the arrest.

While s. 40(2) of The Criminal Code says that, "It is the duty of every one arresting another, whether with or without warrant, to give notice, where practicable, of the process or warrant under which he acts, or of the cause of the arrest", it is well known that, in making arrests in these narcotic cases, it would often be impossible to find evidence of the offence upon the person arrested if he had the slightest suspicion that he might be searched. Constables have a task of great difficulty in their efforts to check the illegal traffic in opium and other prohibited drugs. Those who carry on the traffic are cunning, crafty and unscrupulous almost beyond belief. While, therefore, it is important that constables should be instructed that there are limits upon their right of search, including search of the person, they are not to be encumbered by technicalities in handling the situations with which they often have to deal in narcotic cases, which permit them little time for deliberation and require the stern exercise of such rights of search as they possess.

The appeal is dismissed.

*Appeal dismissed.*

[COURT OF APPEAL.]

**Nixon v. Golembiski.**

*Agency—Real Estate Agents—Right to Commission—Sufficiency of Signed Listing Agreement as Foundation for Action—The Real Estate and Business Brokers Act, 1946 (Ont.), c. 85, s. 37, as amended by 1947, c. 93, s. 6—Terms of Agreement—Sale by Owner—Damages for Breach of Contract.*

The defendant listed his property for sale with the plaintiff, a real estate broker. By the first paragraph of the listing agreement the defendant was appointed "sole agent for effecting a sale thereof", and the defendant agreed to pay him a commission of 5 per cent. By the second paragraph the defendant, in consideration of the plaintiff "listing the property for sale", gave him "the exclusive rights to advertise and offer for sale for a period of one year" at a stated price. The defendant himself sold the property, and the plaintiff sued for 5 per cent. of the sale price as commission.

*Held*, the action must fail, although there had been a breach of the agreement. The first paragraph did not prevent the defendant from himself offering the property for sale and selling it, but the second paragraph did so prohibit him and the defendant, having, by his breach of the agreement, prevented the plaintiff from earning a commission, was liable in damages. *Bentall, Horsley and Baldry v. Vicary*, [1931] 1 K.B. 253, applied. But the action was not framed in damages, and even if it had been so framed the measure of damages was not necessarily commission at the agreed rate on the price at which the defendant sold. To establish his right to that amount the plaintiff would have had to show that he could, but for the defendant's breach of the agreement, have effected a sale at that price. *McCallum v. Williams* (1910), 44 N.S.R. 508, distinguished. The action must therefore be dismissed, but without prejudice to the plaintiff's right to sue for damages for breach of the agreement.

Since the amendment of s. 37 of The Real Estate and Business Brokers Act, 1946 (Ont.), c. 85, by 1947, c. 93, s. 6, it is clear that a written agreement for payment of a commission, signed by the person charged or his agent, in itself satisfies the requirements of s. 37(1), without its being necessary to prove in addition either that the broker obtained a written offer which was accepted or that he showed the property to the purchaser or introduced him to the vendor.

AN APPEAL by the plaintiff from the judgment of Morley Co. Ct. J., in the Fourth Division Court of the County of Grey, dismissing the action.

The facts are stated in the reasons for judgment. The trial judge, in his reasons, after referring to The Real Estate and Business Brokers Act, 1946 (Ont.), c. 85, said:

"This whole question is now decided, having in mind the provisions of s. 37 of the 1946 Act, which are as follows:

"No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale, purchase, exchange or leasing of real estate unless,—

"(a) the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized;

“ ‘(b) the broker or his salesman has obtained an offer in writing which is accepted; or

“ ‘(c) the broker having been authorized to list the property,

“ ‘(i) shows the property to the purchaser, or

“ ‘(ii) introduces the purchaser to the vendor for the purpose of discussing the proposed sale, purchase, exchange or leasing.’

“In the present case, the plaintiff—who is the broker—or his salesman did not obtain an offer in writing which was accepted. Neither, in the alternative, did the broker, even though he was authorized in writing to list the property, ‘show the property to the purchaser’ or introduce ‘the purchaser to the vendor for the purpose of discussing the proposed sale’.

“I am therefore obliged to dismiss this action with costs by reason of the statutory provisions referred to, which constitute an insuperable bar to the right of action.”

The appeal was heard by ROACH J.A.

*J. D. Arnup*, for the plaintiff, appellant.

*P. L. Slaght*, for the defendant, respondent.

7th December 1949. ROACH J.A.:—The defendant listed his property, in the town of Meaford, for sale with the plaintiff, a real estate broker, by a listing agreement dated the 9th September 1948, the relevant part of which for the purposes of these reasons is as follows:

“I, the undersigned, hereby place in the hands of E. N. Nixon of Thornbury, Ontario, the property described hereunder as sole agent for effecting a sale thereof, and I agree to pay him a commission of 5% on the purchasing price when the agreement of sale is completed.

“In consideration of the said E. N. Nixon listing the property for sale, I, my heirs, and assigns give him the exclusive rights to advertise and offer for sale for a period of one year from the date hereof, at the price of \$3800.”

Following the listing of the property, the plaintiff advertised it in the press and over the radio, and his employees took several prospective purchasers to see it but he did not effect a sale of it.

On 18th October 1948 the defendant by his own efforts sold the property to one Kirkpatrick for the sum of \$3,500.

In this action the plaintiff claimed the sum of \$175 by way of commission on that sale.



In his statement of defence the defendant admits the listing agreement, but alleges that he sold the property without any assistance from and not as a result of any efforts of the plaintiff. He admits that he is indebted to the plaintiff for any moneys expended by him for advertising the property for sale. The defendant also pleads The Real Estate and Business Brokers Act, 1946 (Ont.), c. 85.

Kirkpatrick was called as a witness, and it is clear from his evidence that he learned that the property was for sale from the defendant and not from any advertising or other efforts of the plaintiff, and that the plaintiff had nothing whatsoever to do with the sale.

The learned trial judge dismissed the action on the ground that the requirements of s. 37 of The Real Estate and Business Brokers Act, 1946, had not been complied with. The amendment to s. 37 by 1947, c. 93, s. 6, was apparently not called to the attention of the learned trial judge.\* It is clear from the amendment, if any doubt existed before it, that an agreement in writing for the payment of a commission, signed by the person to be charged, in itself satisfies the requirements of s. 37.

On this appeal counsel for the plaintiff contended that even though the plaintiff had nothing whatsoever to do with the sale to Kirkpatrick, he was nevertheless entitled to a commission on that sale by virtue of the terms of the listing agreement.

The agreement must of course be construed as a whole, but in construing it it is convenient to enumerate, in the order in which they therein appear, the rights thereby granted to the plaintiff and the corresponding obligations imposed upon the defendant.

By the first paragraph of that agreement, the plaintiff is appointed the sole agent for effecting a sale of the property. That much is plain. He is also given a right to be paid by the defendant a commission of 5 per cent. computed on the purchase price "when the agreement of sale is completed". The meaning of the words just quoted is not quite so plain, but I think it is plain enough.

The effect of that paragraph, standing by itself, is that if the plaintiff, while the agreement remained in effect, should find a purchaser ready, able and willing to purchase the property at

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\*[This amendment adds the word "or" at the end of clause *a*. Ed.]

a price which the defendant was willing to accept, the plaintiff would thereby earn his commission, and it would be payable to him when the sale was consummated. There can be no question that the commission there referred to is a commission upon a sale to be effected by the plaintiff.

There is nothing in that paragraph, standing by itself, which would prevent the defendant from himself finding a purchaser and selling the property, and if he should do so he would not be under any obligation to pay the plaintiff a commission. The law is that in a contract of agency which goes no further than that paragraph, there is an implied term that the owner shall be at liberty to sell the property himself. If his so doing prevents the agent from finding a purchaser, the agent is not entitled to a commission because the owner has only done that which he is entitled to do: *Brinson v. Davies* (1911), 105 L.T. 134; *Bentall, Horsley and Baldry v. Vicary*, [1931] 1 K.B. 253.

By the second paragraph, however, the plaintiff is given the exclusive right to advertise and offer the property for sale for a period of one year at a price of \$3,800. The agreement is not under seal, but the consideration for the granting of that exclusive right is stated in the agreement, namely, the listing of the property by the plaintiff. In my opinion that paragraph prohibits the defendant himself from advertising and/or offering the property for sale. Advertising and offering for sale are preliminary steps to effecting a sale. Those excluded by that paragraph from so doing are not limited to other agents. All other agents are excluded by the first paragraph. The exclusion provided for by the second paragraph shuts out every one except the plaintiff. In the face of that paragraph it cannot be said that an implied term of the contract is that the defendant himself might effect a sale of the property.

In *Bentall, Horsley and Baldry v. Vicary*, *supra*, the relevant words in the agency agreement were that the agents were "appointed sole agents for the sale of the property" and if they should "introduce a purchaser" they were to receive the special commission of 5 per cent. on the price realized. The agents did not introduce the purchaser and the defendant through his own efforts effected a sale. The agents sued, claiming (a) commission, (b) alternatively damages for breach of contract, (c) in the further alternative a reasonable sum by way of *quantum meruit*. McCardie J. tried the action and dismissed all those claims. He

held that there was nothing in the contract indicating a prohibition against a sale by the defendant himself, and if such a prohibition had been intended it would have been an easy matter to insert the appropriate words. Then he continued thus: "It is also to be noted that the defendant does not say by the contract: 'I give you the sole right to sell.' He says only: 'I appoint you sole agents for the sale,' which is, in my opinion, quite a different thing."

The reasoning of McCardie J. in that case is clear and supports my opinion as to the effect of both the first and second paragraphs of the agreement here in question when taken separately, that is to say, that although the first paragraph does not prohibit the defendant from effecting a sale, the second paragraph does.

A sale does not just happen. It has to be effected either by the owner himself or through the efforts of an agent. Here the owner was prohibited by the second paragraph from offering the property for sale and by the first paragraph the plaintiff was the sole agent who might do so.

Unquestionably the defendant breached the agreement and because of that breach the plaintiff is entitled to be compensated for such loss as he thereby sustained. The plaintiff has not framed his action in damages. Even if he had so framed it the damages would not necessarily be equal to the amount of the commission to which the plaintiff would have been entitled if he had effected the sale. The commission within the contemplation of the parties was a commission on a sale to be effected by the plaintiff, and unless and until he effected a sale he would not be entitled to a commission. It is true that the conduct of the defendant has put it beyond the power of the plaintiff to effect a sale, but before the plaintiff would be entitled to recover by way of damages an amount equal to the amount of the commission he would have to go a step further and prove that were it not for the breach he would, in fact, have been able to effect a sale within the time limited by the agreement.

In *Bentall, Horsley and Baldry v. Vicary*, *supra*, McCardie J. at p. 261 refers to an unreported judgment in *Chamberlain & Willows v. Rose*. In that case the agency agreement was in the terms following: "The property to be left solely in your hands for sale from this date until the auction and for a further period of three months." The owner sold the property before the period expired. The agent then sued for the commission and at the trial



recovered judgment. The Divisional Court allowed an appeal by the defendant, holding, first, that on the special wording of the whole contract the defendant had agreed that no one but the plaintiffs should have the right to sell the property; secondly, that inasmuch as the plaintiffs had not sold the property they could not claim a commission; thirdly that the defendant, however, had committed a breach of contract by himself selling the property. The Divisional Court sent the case back to the County Judge to assess the damages, intimating that the damages might be for less than the amount of the commission inasmuch as the plaintiffs might not have been able to sell the place at all, or, if they could have sold it, they might have got only a very small sum for it.

On this appeal counsel for the appellant relied upon the judgment of the Supreme Court of Nova Scotia in *McCallum v. Williams* (1910), 44 N.S.R. 508, 9 E.L.R. 141. In that case the agency agreement was as follows:

"I hereby request W. D. McCallum or assigns to register the real estate or property mentioned herein in his real estate register and constitute and appoint him my lawful agent and authorize him to sell the above described real estate or property for me and on my behalf, at the price mentioned above or at such lesser price that I may afterwards agree upon; and I authorize him to advertise such property in such manner as he may wish, such advertising, however, to be without cost to me except such as is covered by the commission in case of a sale.

"In consideration of said W. D. McCallum registering my said real estate or property for sale in his real estate register, I hereby agree to pay him a commission of three per cent. of the price obtained whenever a sale of the property or any part thereof takes place.

"Said commission to be paid by me whether said real estate or property is sold either at the price mentioned above or at such other price that I may hereafter accept for said real estate or property. If, however, property does not sell no commission will be charged."

The owner himself sold the property and the agent sued to recover commission, relying upon the terms of the agreement. The County Judge dismissed his action. That judgment was reversed on appeal to the Supreme Court, the judges of the Supreme Court dividing three to two.

It will be seen at once that the language of the agreement there sued upon was quite different from the language of the agreement in the case before me. On the construction given to that agreement by the majority of the Court, the sale on which a commission would become payable was not limited to a sale by the plaintiff, and further, the consideration for the payment of the commission was the registering of the property for sale. In the present case the commission is to be payable "when the agreement of sale is completed", and apart from all other considerations, and having regard to the context in which those words appear, I think, as I have already stated, it is clear that the sale there referred to and in contemplation of the parties, is a sale to be effected by the plaintiff.

I would dismiss this appeal with costs, but without prejudice to any action which the plaintiff may choose to take to recover damages for breach of the agreement.

*Judgment accordingly.*

*Solicitor for the plaintiff, appellant: Elmore C. Carr, Thornbury.*

*Solicitors for the defendant, respondent: MacKay & McAvoy, Owen Sound.*

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